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2492
No. 11707

see vols. 2491-2493
United States

Circuit Court of Appeals

For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

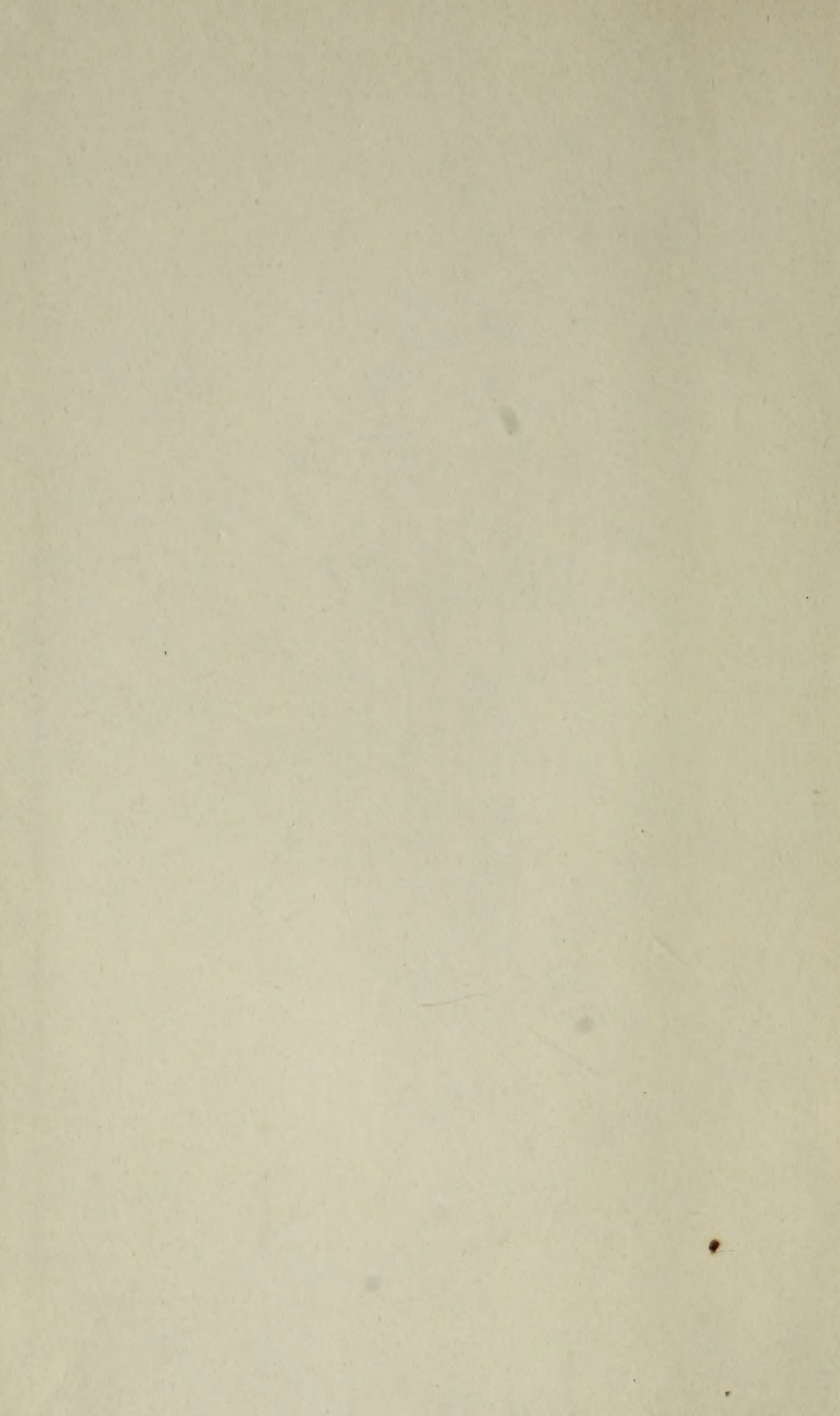
vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

Transcript of Record In Five Volumes VOLUME II Pages 469 to 948

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED
MAR -4 1948



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(Testimony of Patrick L. Darcy.)

Q. Will you tell me whether or not Mr. Schaefer was superintendent on this job?

A. He was, as general superintendent over all operations.

Q. May I have the payrolls again, 16, please? And what would that time be?

A. Well, he was general superintendent over all operations for the entire period of that job.

Q. Was he there at this job for a time as superintendent of the job, or not?

A. He was there off and on quite a bit of the time during the job.

Q. Was he there as superintendent of this job, Mr. Darcy, or not?

A. Not directly as solely superintendent of that job alone.

Q. As superintendent, sir?

A. Not as of that job alone.

The Court: Who is this we're talking about now?

A. I imagine it is William E. Schaefer.

Mr. Holman: William E. Schaefer, the brother.

The Court: The brother of the plaintiff.

Q. Now, is it not a fact that Mr. Schaefer was there as superintendent on the weeks—would you take this payroll, [474] please, and check it—and so charged on the payroll for the week of July 27 to August 2?

Mr. Olson: Your Honor, that's prior to Mr. Darcy becoming superintendent.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Well, I asked him whether he either succeeded him or followed him.

Mr. Olson: I thought you asked if he succeeded him.

The Court: What is this date?

Mr. Holman: The week of July 27 to August 2.

The Court: What year?

Mr. Holman: '44, your Honor.

A. Commencing July 27?

Q. Yes, sir, that week, doesn't it show W. E. Schaefer as superintendent at \$100.00 a week?

A. Not that I can find.

Mr. Olson: Do you know anything about it, Mr. Darcy, except what shows on that payroll, prior to the time you became superintendent?

A. Nothing. The bookkeeping is not my business.

Mr. Olson: I don't think it is a proper question, then, your Honor, to ask Mr. Darcy. It is relating to a period of time prior to his becoming superintendent, and Mr. Darcy wouldn't necessarily know; he says he doesn't.

Q. Pardon me; Mr. Darcy, who was superintendent when you were [475] there as a carpenter?

A. To my knowledge and instructions it was Fred Waltie.

Q. Fred Waltie was your superior?

A. I was given to understand that he was my superior at the time of which you speak; that he was in entire charge of the job.

Q. Then is it not a fact that he was succeeded by Schaefer as your superior on the job?

(Testimony of Patrick L. Darcy.)

A. No; when he took off Schaefer is the one that put me in in Waltie's place.

The Court: Pardon?

A. When Mr. Waltie elected to leave Mr. Schaefer installed me in Waltie's place.

Q. And Mr. Schaefer did not intermediately serve, himself, at all?

A. He was there on the operation.

Q. Well, when do you say that you started as superintendent?

A. The 10th of August, 1944.

Q. And you say that Mr. Schaefer did not replace you as superintendent on this job for the week of August 17 to August 23?

A. No; he was there and worked in conjunction with me, over me.

Mr. Holman: These are rather difficult for the witness to pick up readily, your Honor, and I would like [476] to have him during the recess check and make sure that he is answering me correctly, because they're not only thin paper, your Honor, but they're hard to see.

The Court: Well, I fail to see how the payrolls would help him unless he had something to do with the making of them, in a supervisory capacity or directly.

Q. Doesn't the superintendent on the job furnish the office the hours of employees, from which the payroll is made up? A. That I did.

Q. Yes, sir. Then you could tell me, could you not, whether after you went on the job you furnished William Schaefer's name as superintendent?

(Testimony of Patrick L. Darcy.)

A. I did not turn him in as a superintendent. I merely turned him in as being on the job.

Q. And did not classify him? A. No.

Q. Were you informed that he was superintendent for those weeks?

A. I was informed from long before that that he was general superintendent over all operations.

Q. Were you informed that he was superintendent on this job for the weeks I indicated to you, and charged to this job as such? A. No.

Q. You did not know that, sir? [477]

A. No.

Q. If that is shown to be a fact. All right; now then, is it not a fact that for the week of August 10 to August 16 there was no superintendent charged at all?

A. I wouldn't know; I didn't do that work in the office.

Q. You were there that week, were you not?

A. I was on the job, yes.

Q. But you were not superintendent, were you?

A. I was given to understand that that was my capacity.

Q. Did you act as superintendent at that time?

A. I did.

Q. All right, sir. Now, then, is it or is it not a fact that in September Mr. William E. Schaefer again went back on the job as superintendent? I am referring to the week of August 31 to September 6. A. No.

(Testimony of Patrick L. Darcy.)

Q. And is it or is it not a fact that Mr. William E. Schaefer remained as superintendent for the week of September 7 to September 13, and the week of September 14 to September 20, and the week of September 21 to September 27, and for the week of September 28 to October 11?

A. He was not considered that on that project, if that is a report from the office.

Q. He was not on the project at that time?

A. That is not his standing, that I understood him to be in [478] at the time.

Q. Now, William E. Schaefer, then, was not on this job as controlling superintendent of this job at any time, is that correct, or not?

A. You mean in daily operations?

Q. I mean superintendent on this job, Mr. Darcy.

A. Yes, as general superintendent.

Q. Well, you mean as general superintendent of all Mr. Schaefer's operations?

A. That's right.

Q. But did he superintend this job at all?

Mr. Olson: The witness already testified that Mr. William E. Schaefer was the general superintendent and was his superior officer, which would mean that he was in general charge of all projects, including this one.

The Court: That's what I understood him to say.

Q. The only thing I wanted to know, if William E. Schaefer came there and replaced you at all?

A. No, he didn't replace me.

(Testimony of Patrick L. Darcy.)

Q. O.K. Did you keep a daily report of your operations? A. Yes.

Q. And did you keep a record of the amount of work, and the hours expended, upon each of these structures? A. Yes. [479]

Q. And the time? A. Yes.

Q. Yes; and did you ever send that, or have that, or know that that was sent to Macri and Company within five days after the entry of the item, any item?

A. I wouldn't know whether that was or not. That wasn't part of the project responsibility.

Q. You did not do it?

A. I sent my reports to the main office in Portland every day.

Q. You did not do it, then? A. No.

Q. Nor did you ever give any of Macri's superintendents any record of any accumulated costs that you had had?

A. No, I turned it in to my superiors at the head office.

Q. Nor did you ever get any written direction from any of Macri's superintendents to do anything; correct?

A. Not that I could recall right now.

Q. I mean, you have none? A. Pardon?

Q. You have none? A. No.

Q. Did you ever give any writing to your home office at Portland within five days after having waited for any lumber? [480]

(Testimony of Patrick L. Darcy.)

A. At the end of every day there was a remark written on the back of the report pertaining to those things which was wrong.

Q. Was those things which were wrong, now, when you say which were wrong—

A. The lack of lumber, improper excavation.

Q. You mean those that were wrong in your operations, or wrong in Macri's operations?

A. Macri's operations.

Q. Now, isn't it a fact, Mr. Darcy, that you were sent on to that job for the purpose of keeping for trial use specific records? Correct, or not?

A. It was not.

Q. Does Schaefer and Company—you've been on other jobs of theirs, have you? A. Yes.

Q. Does Schaefer and Company keep a photographic record of all their jobs?

A. We make photographs of pretty near every job.

Q. Do you keep photographic records?

A. Not exactly what you would call photographic records.

Q. Had you operated the Mix Mobile before you came as superintendent on this job?

A. Mixomobile?

Q. Yes, sir. [481] A. No.

Q. And were you the one who selected it as the appropriate equipment for this job? A. No.

Q. And were you the one who removed the elevator from it so it could be used on this job?

A. No, that was done by the concrete crew, the ones who were using the machine on the operation.

(Testimony of Patrick L. Darcy.)

Q. Well, the concrete crew was under your direction, was it not?

A. Not altogether, directly; I gave general orders to the foreman in charge of it to do whatever they saw necessary to keep that work going, because there was times that I couldn't be right with the crew all the time.

Q. Now, is it or is it not a fact that you did a good deal of hunting, away from the job, while you were on the payroll for the job?

A. It is not a fact.

Q. Were you on the job all the time?

A. I wasn't on 1062 all the time.

Q. Or 1068?

A. I was on between 1062 and 1068 what time I wasn't away from the project on other business for the company.

Q. Then this note that counsel read, "Where was Darcy"—

A. On 1068. [482]

Q. You were on 1068 when he was looking for you on 1062, is that right?

A. Yes.

Q. Do I understand you to say that Macri's fine graders were always right where you were pouring concrete, or where you were building forms?

A. I did not. I said they were quite often there.

Q. Quite often?

A. More often than not.

Q. More often than not they were in your way, is that it?

A. Due to the fact that they had to be called back to correct their sub-grades.

(Testimony of Patrick L. Darcy.)

Q. Mr. Darcy, were any of your forms that you built in any way at any time in any part in any manner imperfect, at all? A. The forms?

Q. Yes. Did you ever make a mistake in a single form, building it, independently of the lumber, independently of the fine grading, and independent of the excavation, did you ever make a mistake in a form?

A. Not that I know anything about. If I had the engineers would have rejected it.

Q. Now, if the form itself was built wrong would that then affect its ability to fit in?

A. You mean into the excavation? [483]

Q. Yes, sir. A. Probably might.

Q. Yes, sir.

A. If the excavation is right and the form is made right, they fit together.

Q. Yes. Well, I'm saying, if the form was not made right, would that affect its fitting in the excavation?

A. Yes, it would, if the excavation was correct.

Q. Now, isn't it a fact, Mr. Darcy, that the government representatives do not check the form until it is set in and until it is reported as ready for checking as to level and everything else; isn't that a fact?

A. Sometimes they check it before it is completed, sometimes after.

Q. May I please understand that? You say they check it before it is completed, before the form is completed, did you say, sir?

A. Not as a final check.

(Testimony of Patrick L. Darcy.)

Q. No, but I'm talking about the check by the government, the official check for the government.

A. The final check for acceptance is checked after it is set.

Q. It is checked for grade in the floor, is it not?

A. Yes.

Q. And that is done before the concrete is poured? [484]

A. That's right.

Q. And then the final check, the final pay, is after the concrete is in—well, strike that; you wouldn't know that. Was there any instance of any form that you built that was out the least bit, at any time, anywhere?

A. In what manner?

Q. I don't know; any manner defective.

A. Not to my knowledge.

Q. Did you build the forms yourself?

A. No.

Q. Did you have a form foreman?

A. I had a form foreman in the yard. A few of the forms I did build myself, when I first started.

Q. Wasn't it a fact that you had at the fore part of the job, you had two or three or four carpenter foremen, and one or two carpenters, and that finally when you actually got to operating you had two foremen and a good many more carpenters? Wasn't that a fact?

A. We had a foreman in the yard and a foreman in the field.

(Testimony of Patrick L. Darcy.)

Q. Yes, after you actually got to pouring concrete.

A. No, that was all the time, all the way through.

Q. Well, when you had three foremen what were they for?

A. One foreman on the concrete crew.

Q. And when you had four foremen what were they for? Four carpenter foremen, I'm talking about, now. [485]

A. Carpenter foremen?

Q. Yes, sir.

A. We never had four carpenter foremen.

Q. Are you sure of that, sir?

A. To my knowledge there was never four carpenter foremen on that job.

Q. How many carpenters worked under one foreman on the job?

A. Anywhere from one to any amount.

Q. Well, how many did you have working under one foreman?

A. Well, it varied from two up to—the most I had on the job at any time were about 13, I think.

Q. So it would be from 2 to 13 men under one foreman, that you had?

A. Yes.

Q. And did you leave the responsibility for the correctness of those forms to those foremen?

A. I checked every form as the engineers checked them, when they were completed.

Q. Yes, Mr. Darcy, you checked them when they were in the cut, that's right, isn't it?

A. I checked them from the time they moved up to the hole to start building the form, back and

(Testimony of Patrick L. Darcy.)

forth to watch them put it in, until it was completed. If they weren't right when they were completed I had them correct whatever was necessary. [486]

Q. And if the form were too short or too long, you had to fill or dig out in order to get the form to the proper grade as shown by the control stake, correct or not?

A. I didn't get that question.

(Whereupon, the reporter read the last previous question.)

Q. Too high or too short.

A. We always used a panel large enough or made exactly to the right size to make that structure from the specified sub-grade to the top elevation.

Q. Is it possible that the form could have any defect in it that would determine an erroneous grade for the surface of the floor as poured?

A. Not the way we set them.

Q. Sir? A. Not the way we set them.

Q. It couldn't happen?

A. It could happen, but it didn't.

Q. It didn't happen once? In other words, each form which you set was perfect, is that right?

A. Every form we set corresponded to the specifications of the structure lay-out.

Q. Then that makes it perfect, doesn't it, according to the structure lay-out?

Mr. Olson: That's argumentative. You can ask him if the government accepted each one. That's the thing we're interested in.

(Testimony of Patrick L. Darcy.)

Q. The government doesn't accept the form; the government merely checks it, doesn't it, Mr. Darcy, to determine that it is then a proper time to pour the concrete, that the concrete will be right as to grade and as to wall, isn't that right?

A. They check, O.K., or re-check that form as being ready to pour the concrete, to make the structure come out to the specifications of the structure lay-out plan.

Q. And if it is too high they will have to take some earth out, and if it is too low they will have to put some in, won't they?

A. Whoever's responsible for that operation.

Q. They will have that done? A. Yes.

Q. You don't have to pull the form out to raise or lower it?

A. It all depends on how that form is built, whether they have to take that form out or not.

The Court: We will stop on this case now, and resume at 10 o'clock tomorrow morning. However, the Court has some other matters, and we will adjourn later.

Mr. Holman: Mr. Olson has kindly consented that I might call Mr. King and Mr. Black out of turn as part of our case, for these reasons, your Honor: They have [488] both been subpoenaed; Mr. King has a badly broken arm, and must go to his doctor Friday, and Mr. Black was taken off his own construction job, and the end of the month is approaching.

(Testimony of Patrick L. Darcy.)

The Court: I have no objection, if Mr. Olson hasn't.

Mr. Olson: May I withdraw, then, for the evening, plaintiff's identification 49 to erase it on the back?

The Court: Yes, you may take it out.

Mr. Ivy: There is one matter, your Honor, that will take a moment; I proposed an amendment to the answer of the Continental Casualty Company, which was a substitution of the first affirmative defense in the second cause of action; notice of the motion to amend was given, service acknowledged, and as I understand it, none of the counsel are objecting to that amendment. It is something I should have brought up at the start of the case.

Mr. Hawkins: No objection, your Honor.

Mr. Holman: No objection.

The Court: Did you get what he was saying, Mr. Olson?

Mr. Olson: I think so; that is the trial amendment which relates entirely to the application for the bond. I have no objection.

The Court: All right, the pleadings may be amended, [489] then, in accordance with your application.

(Whereupon, the Court took a recess in this cause until Thursday, February 27, 1947, at 10 o'clock a.m.)

Yakima, Washington, February 27, 1947

10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, I received this telegram from Mr. King, and I knew he was in bad physical condition. He evidently just had to go back to his home.

The Court: Who is Mr. King?

Mr. Holman: He was the witness I spoke of yesterday, your Honor, arranging to call this morning, so I won't need that. The other man has arranged his schedule so he can stay.

The Court: All right.

Mr. Holman: I'm still very much concerned about your Honor asking Mr. Macri during the week end to bring a copy of the assignment made to the bank. I have not received from Mr. Henry any telegram; I have received a certification by Mr. Henry that he's been unable to locate that assignment. Mr. Macri could find nothing whatsoever, and of course he couldn't get into his safe deposit box over the weekend. Did you show the Court the certification? [490]

Mr. Hawkins: No, I haven't submitted that to the Court yet. I still expect to hear from him.

Mr. Holman: I just don't like to go on continually embarrassed. I want your Honor to understand we haven't been able to get it.

PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Holman:

(Whereupon, the reporter read the last previous question and answer on February 26, 1947.)

Q. Mr. Darcy, I think on direct examination you said that you were out of lumber several times?

A. That's right.

Q. Sir? A. That's right.

Q. Was there ever a time that all of the lumber had been used in the forms and all of the forms had been filled with concrete? A. No.

Q. Was there ever a time that any of the forms constructed were all filled with concrete?

A. No, there wasn't.

Q. Well, there must have been at the time of the end of the job. I didn't mean to ask you a catch question, but I mean in your current operations you always had forms [491] ahead, did you not?

A. We had a few forms that were being stripped and moved up to set ahead.

Q. Yes; now, on the matter of stripping forms and moving them ahead, is it or is it not field practice that the forms before they are again used must be cleaned and must be re-cut to fit the other structures? A. Not the system we used there.

(Testimony of Patrick L. Darcy.)

Q. Well, I asked you if that was not field practice. Isn't that general field practice?

A. Not our practice.

Q. Could you answer my question, whether it is general field practice?

A. That's your answer; customary practice doesn't govern our operations.

Q. That's the customary practice, is it?

The Court: Answer the question, if you know what is the customary practice.

A. That may be other operation practice. I wouldn't know what you would consider customary practice.

Q. Have you done any work except for Mr. Schaefer, in concrete? A. Yes.

Q. Have you ever done any Bureau excavation work except for Mr. Schaefer? [492]

A. Not of this type.

Q. —Bureau concrete—you say not of this type? A. No.

Q. In other words, this is the first reclamation project you were on, correct? A. No.

Q. What other reclamation project were you on?

A. Some of the Grand Coulee work.

Q. And on the Grand Coulee work were the forms allowed to be pulled and used ahead without cleaning or re-framing?

A. This was different type of construction; up there the forms were only used once.

Q. They were only used once, yes. So in all your experience in connection with concrete structure,

(Testimony of Patrick L. Darcy.)

forms had been used only once until you came to this job, is that correct?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)

A. No, that's not correct.

Q. Well, what is the fact? A. What is it?

Q. What is the fact?

A. The type of job governs whether the form is used once or several times. [493]

Q. And on this type of job, was it such that the forms could be used several times, or once only?

A. The majority of them were supposed to be used a good many times.

Q. Now, in the matter of the use of lumber, were your estimates made upon re-use of the lumber, or not?

A. They weren't made on the re-use of the lumber; they was made on the re-use of the panels.

Q. Well, I don't mean to be captious. I'm talking, of course, about the lumber that's in the forms, Mr. Darcy. A. That's right.

Q. Was it or was it not a fact that you were furnished with an adequate supply of veneer at the commencement of the job, or do you know?

A. No, there wasn't.

Q. Well, you weren't there, were you?

A. I wasn't there, but I knew how much plywood was there, and knew how much would be required.

(Testimony of Patrick L. Darcy.)

Q. Now, when you first took charge, did you make a requisition for plywood?

A. Not the first day.

Q. How long was it before you made a requisition for plywood?

A. I think it was about the 26th of July, 1944.

Q. That would be about a month or so after you were on the job? [494]

A. Yes.

Q. And before you became, you say, superintendent on the job?

A. Yes.

Q. To whom did you make the requisition?

A. To Mr. Macri's superintendent.

Q. Who was that?

A. Mr. Mose Stickney.

Q. Mr. Stickney, yes; what kind of a requisition? Did you make an order, signed?

A. Just a written list.

Q. For veneer?

A. Including veneer and other dimensions of lumber.

Q. All right. Now, at that time were there any forms set?

A. Yes, there were.

Q. And had those forms been filled with concrete?

A. No.

Q. Had any forms been filled with concrete?

A. None.

Q. Had you made an estimate of the total lumber required for the job, Mr. Darcy?

A. Not at that time.

Q. Do you know what amount of lumber would, on the average, be required for structures throughout a job like this?

A. On that project, approximately 120,000 feet.

(Testimony of Patrick L. Darcy.)

Q. Approximately 120,000 feet; how do you arrive at that? [495]

A. By the regular system of estimating contact footage of forms.

Q. I didn't hear what you said.

A. By a regular system of estimating contact footage of forms, and approximate number of reuses per form panel.

Q. Well, will you amplify that? Explain it, will you?

A. Well, the contact footage——

Q. Just give us the steps; explain how you arrived at it.

A. The contact footage of form is the amount of form that contacts the concrete surface.

Q. Yes.

A. Take your structures as a general average, or take them one by one, and figure them all out, as you wish.

Q. All right, what was the general average?

A. Well, the average would be so many settings of each certain type.

Q. I'm talking now about the average requirement of board feet per structure.

A. I haven't those figures right now; I could look them up.

Q. Can you give me approximately it?

A. Approximately 150 or 160 feet per cubic yard.

Q. 150 or 160 feet per cubic yard of concrete poured, is that the idea?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Then it would require, would it, for a seven inch wall [496] more lumber than for a five inch wall? A. Of course not.

Q. And would it require more lumber for a seven inch base than a five inch base? A. No.

Q. Then how do you tie that to the cubic yardage? Why don't you tie it to surface area, in your computation?

A. I don't quite understand what you ask.

Q. Why do you tie it to cubic yardage, say it takes so much per cubic yard, when the surface is the thing that controls it?

Mr. Olson: Your Honor, counsel asked this witness how much it took per cubic yard on this job.

Mr. Holman: No, I didn't, your Honor.

The Court: Let's talk one at a time.

Mr. Olson: Counsel asked this witness—I don't think it is proper cross-examination anyhow, because I didn't go into it, but I'm not particularly interested in that. He asked this witness to give the approximate amount of lumber it took on this job. He answered so much per cubic yard, and counsel wants to know why you give it in cubic yardage instead of square footage.

The Court: I think I'll overrule the objection, if it is an objection. I think this estimate of 120,000 board feet, I suppose, for the whole job—is that 1062 [497] and 1068 both?

Witness: No, 1062 only.

The Court: I wonder if we could have it understood here that we're talking about 1062 unless it is otherwise specified?

Mr. Holman: Yes, your Honor.

(Testimony of Patrick L. Darcy.)

The Court: If you want to talk about 1068, mention 1068, otherwise I'll assume you're talking about 1062. Is that acceptable?

Mr. Olson: That's acceptable.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Darcy, if you were going to estimate the lumber to cover this side of the room, why would you estimate instead, as a test, the amount of structure behind this wall? Why do you tie it to quantity instead of square footage?

A. Possibly I wouldn't, on fashioning that wall.

Q. All right, why do you do it in structures?

A. On those structures they run from five to eight inches, and they were figured on a general average, because all panels were used for the same walls, whether five, six, seven, or eight.

Q. Isn't it a fact you have taken the total amount of lumber under the tabulation and divided it by the cubic yardage to get your average, and that you didn't do it in [498] the field?

Q. Yes, sir, in the field; you knew the surface you wanted, and you determined the lumber by that surface, didn't you? A. Not entirely.

Q. Your carpenters had to, didn't they, Mr. Darcy? A. What's that?

Q. Your carpenters had to do that, didn't they? They had to cover a surface?

A. The carpenters set the forms, yes.

(Testimony of Patrick L. Darcy.)

Q. They had to cover a surface, didn't they?

A. That's right.

Q. And that determined the area?

A. Naturally, the surface area.

Q. And that determined the quantity of lumber, didn't it?

A. Not necessarily.

Q. What else would there be?

A. It would determine the quantity of lumber if you figured it out merely as surface contact of each form all the way through, but for the purpose of determining the amount of lumber needed you don't have to figure every foot of each structure when you've got a set up average.

Q. How much at any time of the forms remained unpoured when you called for lumber, how many forms? [499]

A. What was that?

Q. How many forms remained unpoured at any time you called for lumber, forms set up in the excavation?

A. About the most we would have set when we would be running out of lumber for setting more would be approximately 25 or 30, at the most.

Q. How many did you have when you made this first demand?

A. Right off hand now I wouldn't say.

Q. Well, didn't you tell your own counsel how many were there when you came on the job?

A. You mean how many were set?

Q. Yes, how many forms were set?

A. Yes.

Q. How many were?

(Testimony of Patrick L. Darcy.)

A. Between 24 and 25, when I first went there.

Q. Yes, sir. Now, then, when you made this demand of lumber, how many forms had been increased, from 24 to 25, or how many were there?

A. Oh, possibly 30 more.

Q. So that between the time you came in June and the time in July that you gave this list to Mr. Stickney there had been 20 or 25 forms additional built?

A. I wouldn't say exactly. There were approximately that.

Q. But none of the first forms had yet been poured with [500] concrete? A. No.

Q. Then when did you next make a demand for lumber?

A. I'd have to refer to the records before I would answer that.

Q. Now, at the time you made the demand for lumber in June, or July, it was pretty hot out there in the field? A. Yes.

Q. And the lumber in the forms standing empty, without concrete, had a tendency to crack, did they not? A. Not to crack, but to shrink.

Q. Yes, to shrink; in other words, the usual heat action on lumber? A. Yes.

Q. And when you put the forms in was the same weather condition prevailing? A. Yes.

Q. And it had the same effect, did it?

A. Well, it didn't have the effect on the lumber that we had there on hand at the time we started

(Testimony of Patrick L. Darcy.)

the first of July, because that lumber had already been there and dried out, what little there was of it.

Q. In other words, it was weather cured then?

A. Yes.

Q. But after you built the structure and left it unfilled [501] the weather began action on it, did it not?

A. Yes.

Q. And to that extent the efficiency of the forms was somewhat depreciated, wasn't it?

A. Well, if they set for a good length of time it might be, a little.

Q. Hadn't they set for a good length of time then?

A. Some had.

Q. How long had they been setting?

A. I don't know, I wasn't there when they were set.

Q. Well, how long had they been setting after you got there, before concrete was poured in them?

A. The ones that was set when I arrived there remained another month before they got concrete.

Q. Actually there was no concrete poured until the month of August, was there? July 31, I think was the date.

A. That's correct.

Q. Up to that time there had been no concrete poured. Now, can you tell me whether or not in advance of that date the Mixomobile was standing by on this job ready to pour?

A. No, it wasn't.

Q. Where was it?

A. Working in Portland.

(Testimony of Patrick L. Darcy.)

Q. In other words, it was working on another job?

A. Well, I wouldn't swear to whether it was working or not; [502] it was in Portland.

Q. And was there any mix machine on the job for Schaefer until the Mixomobile came up?

A. No.

Q. The other 200 jobs Mr. Schaefer spoke of were currently going along and his equipment was being used on those, weren't they?

A. I presume so; that was in Portland.

Q. If you know; I don't want presumptions. If you know, say.

A. Well, I'll say no, being up here.

Q. Weren't you a Portland man, and weren't you operating out of the Portland office, and taking directions from Portland?

A. That's right.

Q. And still you do not know?

A. I was up here.

Q. Did you make any request for delivery of a mixer when you came to the job? A. No.

Q. When you became superintendent?

A. It was already on the job.

Q. In other words, there was no equipment there for mixing concrete until you were on the job?

A. No. [503]

Q. Until you were on the job as superintendent?

A. No, it was there before.

Q. What is the distinction between superintendent and carpenter foreman, on this job?

(Testimony of Patrick L. Darcy.)

A. Well, on this job there isn't much distinction between superintendent and foreman when the superintendent has to get out and work along with the men to see that things are able to move.

Q. But isn't it a fact that on the Schaefer payroll from beginning to end you're designated only as carpenter foreman?

A. I don't know what's on the certified payroll.

Q. Didn't you at my request look at it? I asked you to do it; didn't you look at it last night?

A. You didn't request that I look at it last night.

Q. I thought I did, Mr. Darcy?

A. I didn't understand you to ask that.

Q. I think you already told me you prepared the time to send in to the Portland office?

A. That's right.

Q. And designated the men?

A. That's right.

Q. And you designated yourself each time as carpenter foreman? A. No. [504]

Q. What did you designate yourself as?

A. Superintendent, on most of them.

Q. Well, when you say "most of them," beginning when and ending when?

A. Well, I'd have to look through the records there to find out when.

Q. So that if the payrolls show you as carpenter foreman, that is not a correct position you had with Schaefer, is that right?

A. That would be correct, yes, but possibly not sufficient as a technical designation of actual capacity.

(Testimony of Patrick L. Darcy.)

Q. In your field work you spoke of being over at 1068 when the government man, Reynolds, in his field notes asked "Where was Darcy." What were you doing at 1068 at that time?

A. Checking the progress of operations down there, condition of excavations.

Q. Were you working on 1068 at all at that time? A. No.

Q. In other words, you went over to 1068 for the purpose of checking up on Macri's operations over there, to report to Mr. Schaefer, correct?

A. Correct.

Q. You didn't go over there for the purpose of doing anything in connection with accelerating the work on 1062, did you? [505] A. No.

Q. All right, how long were you over on 1068, just a day, or a considerable time?

A. Do you mean on that instance?

Q. Yes, at the time this man is asking where you were. A. About three hours.

Q. Now, isn't it a fact that you weren't on that job at all that day? A. No, it isn't.

Q. And isn't it a fact that your crew had no guidance that day? A. That's not a fact.

Q. And isn't it a fact that was frequently so, Mr. Darcy, frequently you left your crew without any instructions or supervision?

A. No, that's anything but a fact.

Q. Isn't it further a fact, Mr. Darcy, that Mr. Will Schaefer was sent up there for a period of three weeks as superintendent, and then came back again for a period of an additional week as super-

(Testimony of Patrick L. Darcy.)

intendent, charged to this job at \$100.00 a week, for the purpose of determining whether or not the work should continue or they should quit?

A. No, it isn't.

Q. That is not a fact? O.K. And is it not a fact that before you came up you had a talk with Mr. William Schaefer [506] and got rather specific instructions what not to do? A. No, it isn't.

Q. And isn't it a fact you got rather specific instructions as to what to look for and make notes upon so it could be used later against Macri?

A. It is not.

Mr. Holman: Now, these pictures, are you going to identify those now, Mr. Olson?

Mr. Olson: Yes.

Mr. Holman: Would you be willing to do that so I can go on with my examination?

The Court: Have you got the ones picked out you're going to use, Mr. Olson?

Mr. Olson: Yes, your Honor. We couldn't get new pages for that. I have new tabs all ready to insert them, but I was reluctant to take them out of that identification except in court.

The Court: Oh, I see, you have already got this marked.

Mr. Olson: I was going to suggest we re-mark this under the same identification and I'll transfer the pictures right here. I think the witness is going to have to at least tell the court that it is a picture of structure number so and so, taken a certain date.

(Testimony of Patrick L. Darcy.)

Mr. Holman: That, of course, we would expect.

Mr. Olson: So I'll have to do it right in court. For that reason I haven't transferred the pictures out of that album.

The Court: You haven't reached any agreement with counsel as to what ones may be presented without identification?

Mr. Olson: No.

Mr. Holman: We haven't been asked.

The Court: Well, they will have to be offered one at a time, then, I should think. That's the only way I can see to handle it if you haven't any agreement.

Mr. Olson: Well, I see what your Honor is suggesting. I had first assumed that there would be no specific objection made to one picture that wouldn't apply to the others. Do you feel that there will be a specific objection made to any one photograph that will not apply to the others?

The Court: Well, as I recall, there were some of those taken by this witness and some were not.

Mr. Olson: That is correct. I'll have to start out with the ones taken by Mr. Darcy, and transfer those, and still not offer it until I have the others identified by Mr. William Schaefer. I'm perfectly willing to proceed.

Mr. Holman: Well, I can proceed a little ways, your [508] Honor, with the cross-examination, but with these pictures behind us and not available for cross-examination it does rather hinder.

(Testimony of Patrick L. Darcy.)

The Court: Well, suppose you go ahead and put the pictures in, then. We'll take this witness off and put on whoever is necessary to put them on.

Mr. Olson: I'll start with Mr. Schaefer.

The Court: Identify them one at a time, if counsel insists on that.

Mr. Holman: No, I don't think we'll insist on that.

The Court: Are those placed in the album so that you can refer to them in a way that will identify each picture?

Mr. Olson: I was going to suggest we put a little number on each one, if we can.

The Court: Well, you've got the whole thing marked as plaintiff's 49.

Mr. Hawkins: Your Honor, so that there will be no misunderstanding, my objection to these pictures was that there is a great deal of written material connected with the picture and on the reverse side. If counsel wants to remove that and then ask his witness whether these pictures represent the situation out there——

Mr. Holman: We have not asked for individual identification, [509] your Honor.

The Court: I assumed you were going to. If not, they can be identified as a whole. As I understand, you have removed the writing on the back of each picture.

Mr. Olson: That's correct, with the exception of the date, and in some instances the number of the structure. This has 3/4/45. Now, here's one that it's not removed on.

(Testimony of Patrick L. Darcy.)

The Court: You mean the writing isn't?

Mr. Olson: I thought we had all this off.

The Court: Is there any objection to leaving the date and the structure number on the backs of those?

Mr. Holman: I think that should be on there, your Honor. If it isn't, we'll get lost after while as to what it covers.

The Court: Of course, if counsel wants to show the date, that would be material. If it isn't shown, it can be on cross-examination.

Mr. Holman: What I do object to is handing up this album and having him identify it by the reading below.

The Court: Well, yes, that is objectionable, but if you'll have the witness tell which ones he's taken, and what they represent, then we can offer them as a whole, with the understanding that they will be transferred [510] to another album on which there is no writing, and also that any writing on the backs of each picture other than the structure number and the date will be removed by the clerk, if that hasn't already been done.

Mr. Olson: I thought it was already done.

The Court: If there are any that have been missed it will be removed by the clerk. Is that satisfactory?

Mr. Holman: Satisfactory.

Mr. Hawkins: Yes, your Honor.

(Whereupon, the witness Darcy was temporarily excused from the witness stand.) [511]

Yakima, Washington, February 27, 1947

(All parties present as before, and the trial was resumed.)

WILLIAM E. SCHAEFER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Olson: I wonder if we can have this new album marked as plaintiff's exhibit for identification 49, then?

The Court: Yes, I assume there is no objection to the transfer.

Mr. Holman: I do request counsel that he not show the witness the picture in the album with the label below. I object to that strongly. Let him see the picture, but not the endorsement below. Take the picture out; it has to go in the other album anyway.

Mr. Olson: Well, I'll start out that way. I think the witness has got a right to refer to the notes.

The Court: If he made the notes and it is necessary to refer to them to refresh his memory, he may do so. It isn't proper to read them into the record. I'm assuming he made the notes.

Mr. Olson: Will it be agreeable, your Honor, if I refer to these pictures as 49-1——

The Court: Well, you haven't got more pictures there [512] than the letters in the alphabet?

Mr. Olson: I think we have. There's one or two that I don't expect to offer; for instance, one

(Testimony of William E. Schaefer.)

is a picture of the fog; I don't see anything to be gained by putting in a picture of the fog, or a panorama.

The Court: You can number them individually, then, and they will be a sub-number in the album.

Mr. Olson: Can I do that for convenience as I hand them to the clerk?

The Court: Yes, that's all right.

Direct Examination

By Mr. Olson:

Q. Handing you a photograph which is designated plaintiff's 49-1, I'll ask you to state what it is. Not what it shows, just what it is.

Mr. Holman: I'm wondering if we can't get the date it was taken and where it was taken in each instance. Could we do that?

Mr. Olson: Well, this particular picture we didn't take, your Honor. It is one that was taken by the Bureau of Reclamation. I simply want to ask if it is a fair picture of the mixer that was out there on the job.

The Court: At about what time?

Q. Do you know about when that picture was taken, Mr. Schaefer? [513]

A. I'd say that was taken the first part of August.

The Court: That would be 1944?

A. 1944. I didn't take the picture.

Q. And is that a fair representation?

A. That is a fairly good picture of the Mixo-mobile.

Q. Of who?

(Testimony of William E. Schaefer.)

A. Of the Concrete Construction Company, and the water wagon.

Mr. Holman: Could you pass that through us to the clerk as you go along?

The Court: Well, we've got back to identifying these one at a time, as I originally suggested. Is there any method by which you could group them, of the pictures made by the witness?

Mr. Olson: Under the suggestion of counsel it appeared to me I could just transfer these and have Pat Darcy testify, if he will, that they were taken on the job and show a fair representation of the conditions there, and number them, and then let counsel cross-examine on any they want to. If that's agreeable I can transfer these pictures.

Mr. Holman: What is this marking "25-26?" Is that the picture number?

Mr. Olson: That is the structure number, as I understand it, of the particular structure.

Mr. Holman: I think that should be explained.

Mr. Olson: I think I can do that in the group without doing it picture by picture. I can ask Mr. Darcy about all of this, if they're not going to object on the ground he didn't take them.

Mr. Hawkins: Can't he take a block of those pictures and state they were taken about the 1st of August, 1944, and that they are an accurate representation, instead of going over picture by picture?

Mr. Olson: I think so. A

(Testimony of William E. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Showing you this second picture, 49-2, I'll ask you approximately when that was taken?

A. The 1st part of August.

Q. And what is it a picture of?

A. It is a picture of structure 61, of the Buggymobile ready to pour concrete in said structure.

Q. And whose Buggymobile is it?

A. Buggymobile of Concrete Construction Company.

Q. Taken by the Bureau of Reclamation?

A. I believe that picture was taken by the Bureau of Reclamation.

Q. Now, Mr. Schaefer, if you'll take this album, can you tell us how many of the pictures were taken by you?

A. I took all these pictures on this page.

Q. Well, now, that is the first page in the album?

A. Yes.

Q. Now, did you also take all the pictures on the second page? A. Yes.

Q. Did you also take all the pictures on the third page? A. Yes.

Q. Did you also take all the pictures on the fourth page? A. No.

Q. Did you take any of the pictures on the fourth page? A. No.

(Testimony of William E. Schaefer.)

The Court: I think the record should show there are four pictures on each of those pages he says he took, is that right?

Q. There are four on each of these pages you said you took? A. Yes.

Q. Did you take those pictures at approximately the same time, do you know?

A. I can tell by looking at the back of the picture.

Q. Well, let's do it.

A. That picture was taken May 10.

Mr. Holman: What is that number?

Q. That will be number 4. Take a look at all four pictures on the first page, Mr. Schaefer, which will be numbered 3, 4, 5, and 6, and see if they were not all taken on May 10, 1944.

A. Yes, all taken on May 10. [516]

Q. Now, will you turn to the second page, Mr. Schaefer, and see if these pictures were taken on the same date?

A. I believe all the pictures I took in here I took the same date; I'm not sure.

Q. All right, then, referring to plaintiff's 49-7, will you look on the back and see if you can tell what excavation number that is, or what structure?

A. That is a picture of the excavation of structure number 43 and 44.

Mr. Olson: That should also, I assume, show on the bottom of the picture.

(Testimony of William E. Schaefer.)

The Clerk: They can take it out if they want that information. I'm just going to put the number on it.

Mr. Olson: That's agreeable. It shows on the back of the structure number, and it is agreeable if it isn't written again on the front.

Mr. Holman: I'm perfectly willing to make you my personal representative to see that there is nothing on there that shouldn't be.

Mr. Olson: Thank you.

Mr. Hawkins: To expedite this a little, I wonder if the witness could not take these pictures and write the date and also the station and then just offer them in the mass?

Mr. Olson: I'll do that after I finish these few, if [517] the Court will permit me; I'll make the transfer of the balance of them with Mr. Darcy and offer them in mass.

The Court: It would be more convenient to have the date and station number on the face of the picture, otherwise we'll have to be pulling them out all the time, but I wonder if that couldn't be done at adjournment?

Mr. Olson: We'll do that, your Honor.

The Court: It is on the back now and you can transfer it to the front some time during adjournment.

Mr. Olson: That being the case we'll just transfer these and I won't ask about the structure numbers at the present time.

(Testimony of William E. Schaefer.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Now Mr. Schaefer, there have now been removed from the book all of the pictures that you yourself took?

A. Yes, so far as I see now.

Q. And they were all apparently taken on May 10, 1944?

A. Yes.

Q. And on the Roza Project?

A. That's right.

Q. 1062.

Mr. Holman: How many is that?

Mr. Olson: Twelve pictures.

Mr. Holman: That would be 49-12?

Mr. Olson: No, the first two were Bureau pictures. [518]

Mr. Holman: 49-14 will cover Mr. Schaefer.

The Court: That will be 3 to 14, taken by William Schaefer?

Mr. Olson: Yes. That's all for Mr. Schaefer.

The Court: Any questions on these exhibits?

Mr. Hawkins: No questions at this time.

Mr. Holman: No, your Honor.

The Court: Or identifications; they're not in evidence yet.

Mr. Holman: May I understand these were all on May 10?

Witness: Yes.

(Testimony of William E. Schaefer.)

Mr. Hawkins: What kind of camera was that?

Witness: I think it was a 116; it was a small box camera.

(Whereupon, there being no further questions, the witness was excused.) [519]

Mr. Olson: As I understand it, we'll make the transfers ourselves of the rest of these pictures?

The Court: Yes, you may do that.

Mr. Olson: Or we can do it right now, whatever—

The Court: Well, we might want to refer to them and look at them. They should be out of the album where the writing appears. Perhaps you had better just transfer them now.

M. C. SCHAEFER

the plaintiff, a witness in his own behalf resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Olson:

Q. Showing you picture number 15, did you take that picture, Mr. Schaefer? A. I did.

Q. And on what date?

A. On September 4, '44.

Q. And whereabouts? A. At the job yard.

Q. What is it a picture of?

A. That is a picture of the forms in the yard.

(Testimony of M. C. Schaefer.)

Q. Showing you picture number 16, did you take that picture? A. I did.

Q. And when was it taken?

A. That was taken September 22.

Q. And whereabouts?

A. In the job yard.

Mr. Olson: I think that I should advise your Honor that I believe this is a duplicate of a picture that is already in evidence.

Witness: I believe so. [520]

Mr. Olson: I recognize it. I don't know as it will make any difference.

The Court: Well, if you wish to keep the continuity in the album, why not make a notation parenthetically on the bottom of it, "duplicate of number so and so"?

Q. Handing you picture number 17, I'll ask you if you took that picture? A. I did.

Q. And on what date?

A. On September 4.

Q. And it is a picture of what?

A. Of forms in the job yard.

Q. Handing you picture number 18, I'll ask you if you took that picture? A. I did.

Q. On what date?

A. On September 22, '44.

Q. And of what is it a picture?

A. It is a picture of the job yard, the lumber, and brother Bill is in that picture.

Q. Handing you picture number 19, did you take that picture? A. I did.

(Testimony of M. C. Schaefer.)

Q. What date? A. September 22.

Q. And where? [521]

A. In the job yard.

Q. And what is it a picture of?

A. It is a picture of some second hand lumber.

Q. This entire page of which the picture I just spoke of is *one are* already in evidence, are they not?

A. I believe the four pictures are in evidence.

The Court: Why not just skip that page, if it won't disarrange your order?

Mr. Olson: You'll just have to take that page out. That's all, then, for Mr. Schaefer.

Cross-Examination

By Mr. Hawkins:

Q. What kind of a camera did you use, sir?

Mr. Olson: You're asking for the trade name, are you, counsel?

Witness: I think that that was taken with a Speed Graflex.

Q. What's that?

A. I couldn't tell you that.

Q. Cut film? A. It is a pack film.

Mr. Hawkins: That's all.

The Court: Any other questions?

(There being no further questions, the witness was excused.) [522]

PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Mr. Olson: You can take the next out. Counsel, I'm speaking of this next page. It is a picture of the fog and a paroramic view, and lumber, that's already in evidence.

The Court: I don't think they will object to skipping them. Have them available if they want to take them up and identify them.

Redirect Examination

By Mr. Olson: .

Q. Showing you picture number 19, then, Mr. Darcy, I'll ask you if you took that picture?

Mr. Holman: I move that the testimony of M. C. Schaefer with respect to 19 be stricken, then, or otherwise they will be duplicated.

The Court: I think the record should show that the testimony of M. C. Schaefer with reference to sub-identification 19 be stricken, and it is understood that picture be withdrawn.

Witness: Yes, I took that picture.

Q. On what date? [523] A. March 10, '45.

Q. And whereabouts?

A. Structure 461-62-63, east turbine lateral, on 1062.

Q. And is the picture a picture of those structures? A. Yes.

Mr. Holman: Is that indorsed on there?

Mr. Olson: We'll make the indorsement. This picture has a notation on it which should be re-

(Testimony of Patrick L. Darcy.)

moved. As I understood, your Honor was suggesting that I do have him state what it is a picture of.

The Court: Well, if he can identify them in groups or pages, I think it would save some time here. I'm familiar with the pictures, and I can't say whether counsel would object, but you might try it, if you think you can.

Mr. Olson: I don't think I can do it quite that general, your Honor.

Mr. Holman: Mr. Olson, did Mr. Darcy take the rest of these?

Mr. Olson: Yes, that is, he can identify them. I think there is one or two here that he appears in the picture. While he didn't take it, he can identify it.

Mr. Holman: I'm just wondering if you couldn't hand them all to Mr. Darcy and then put the dates and the structure on the picture, and save a lot of time [524] unless you want it in the record. You've got 98 to list, is what I was trying to help you on, counsel.

Mr. Olson: Well, we're up to 20 some, and it goes pretty fast. I think we can go through this pretty fast, your Honor. That's 19 you have there?

The Clerk: Yes.

Mr. Holman: Could he tell us the camera he used? Then we won't have to ask that again.

Q. What kind of a camera did you use?

A. Brownie V-616.

The Court: On all of them that you took?

(Testimony of Patrick L. Darcy.)

A. The majority of these, yes. I think there aren't more than four of the pictures in the entire lot here that were taken with a Contax camera number—I don't remember what number it was.

The Court: Are the remaining pictures all the same size?

A. They're all the same size picture.

Q. All right, Mr. Darcy. Handing you picture number 20, I'll ask you when that picture was taken.

A. March 10, '45.

Q. By whom? A. By myself.

Q. And of what is it a picture?

A. It is a picture of the Benton County caterpillar towing [525] our mixer away from structure 479-480-481.

The Court: Did you take all the rest of them in that album, Mr. Darcy?

A. Except the ones in which I'm shown.

The Court: Will you point those out when we get to them, and after this you won't have to ask that question each time; just what it is and when it was taken.

Q. Picture 21, would you state when that was taken? A. March 10, 1945.

Q. And of what?

A. Pouring operations on east turbine turn-out slab, structure number 461-62-63.

Q. Now, these pictures, Mr. Darcy, are all on 1062 unless we designate otherwise?

A. That's right.

(Testimony of Patrick L. Darcy.)

Q. Picture number 22, when was it taken?

A. March 10, 1945.

Q. And of what?

A. Pouring slab and turn-out, east turbine, 461-62-63.

Mr. Holman: A different view of the same operations, is that the idea?

A. Different view of different parts of the structure.

Q. Picture 23, when did you take that?

A. March 10, 1945.

Q. And a picture of what? [526]

A. That is the Benton County caterpillar moving our mixer on the next move down from 461-62-63.

Q. Now, picture number 24, when was that taken? A. February 9, 1945.

Q. That picture you did not take, I assume—did you?

A. No, I took that picture.

Q. Where was it taken?

A. In our yard at 1062.

Mr. Holman: Is that the same as the job yard that you previously referred to?

A. Yes, the job yard.

Q. What is it a picture of?

A. That is a picture of the first two loads of lumber that were delivered for construction on the turbine lateral, chute and stilling pool and separation structure.

(Testimony of Patrick L. Darcy.)

Q. Showing you picture number 25, when was that picture taken, if you know?

A. I didn't date that picture, and it was dated as received in the Portland office March 4, 1945. It was taken about—that would be the previous Sunday to that date.

Q. What is it a picture of?

A. It is just another picture of the turbine lateral chute lumber in the yard, showing how it was covered and protected from the weather.

Mr. Holman: You say it was the Sunday previous [527] to what date?

A. The Sunday previous to March 4, which was the date it was received in the Portland office.

Mr. Holman: He didn't take that picture; he wasn't on the job.

Mr. Olson: It was 1945.

The Court: I didn't hear what Mr. Holman said.

Mr. Holman: I said he was not on the job. I didn't hear him say it was 1945; in 1944 he was not there.

The Court: Oh, yes.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Picture number 26, when was that taken?

A. That is another one of a series of the same roll here, that was taken on that particular Sunday.

Q. The next three are all the same date?

A. Yes, and I think that's all from that roll.

Q. All right; now, number 26, what does it show?

(Testimony of Patrick L. Darcy.)

A. It shows construction, the frame construction, of the turbine lateral chute, inside form sections.

Q. And number 27, where was that taken, and of what?

A. That was taken up alongside of the chute site; shows a load of material set off there ready to be set in place for pouring.

Q. Number 28, what is that a picture of? [528]

A. That shows a series of the outside form panels set for turbine chute, ready to receive the inside form sections.

Q. Now, referring to the next page, can you tell us, were they all taken on the same date?

A. They were all taken on the same date, on the turbine chute, showing operations, the setting, and so on, on the turbine chute construction.

Q. What date were those taken?

A. On the 7th of March, 1945.

Q. Now, picture number 29, these pictures as a group show what, Mr. Darcy?

A. The operation of moving a form section, cleaning, resetting, and finishing of the concrete, and one form in place with steel weights on it to hold it down against the lift of pouring concrete.

Q. And that would be referring to a group of six pictures, which would be 29, 30, 31, 32, 33, and 34?

The Court: We'll take a mid-morning recess now for ten minutes before we proceed. That finishes that group, up to 34.

(Short recess.)

(Testimony of Patrick L. Darcy.)

(All parties present as before, and the trial was resumed.)

Redirect Examination
(Continued)

By Mr. Olson:

Q. Handing you pictures numbered 35 and 36, what do they [529] show, Mr. Darcy?

A. They show the actual pouring operations on the turbine chute, mixer placing concrete.

Q. And how about pictures 37, 38, and 39?

A. 37 is the picture we spoke of a bit ago of myself stripping the transition section at the lower end of the chute.

Q. Now, that picture you didn't take?

A. No.

Q. But you appear in the picture?

A. That was taken by the inspector on the job, with my camera.

Q. All right.

A. 38 is a picture down the chute.

The Court: If he was present why not have him show what that picture is, and if there is no objection, we can let it go in with the others.

Q. What does 37 show?

A. Well, it shows me stripping the transition section preparatory to moving it to another setting.

Q. Now, the Clerk has all those pictures numbered, Mr. Darcy. Could you go through them in

(Testimony of Patrick L. Darcy.)

numerical order and state what each picture shows, without giving anything argumentative?

Mr. Holman: How about the dates? [530]

Mr. Olson: Well, the dates, as I understand it, appear on the back, and we are to transfer on to the front of the picture the date and the location.

The Court: Does Mr. Darcy know what dates are shown on the back of the pictures?

Mr. Olson: Not without looking, I don't believe. We would have to take them out and put them back.

Mr. Hawkins: Are you the one who put the dates on the back?

Witness: Yes.

The Court: Did you put on the date in each instance? A. Yes.

The Court: Well, why not let it go at that? If counsel want to inquire, they can take the individual picture.

Redirect Examination
(Continued)

By Mr. Olson:

Q. Now, take the picture and state what it is.

A. Number 35 shows the mixer pouring concrete in the chute section; 36, another view of the same thing; 37 shows me stripping a transition section; 38 shows the inside sections of the chute forms set up ready for the second pour; number 39 shows the same thing with the rock weights in place.

Q. Well, this particular group of pictures which you have [531] just referred to all refer to that turbine chute? A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Then proceed, beginning with picture 40.

A. 40 shows the outlet end of the stilling pool, the lower end of the chute; 41 is another angle shot of the same structure showing some of the construction on it; 42 shows the separation structure where the east and west turbine laterals separate, finished and back filled; 43 shows the separation structure under construction.

Mr. Holman: The same structure?

A. The same structure, only the forms under construction; number 44 is another picture from the other end of the separation structure, showing the form construction.

Q. Now, referring back, Mr. Darcy, to picture number 40 of the stilling pool, was that, with reference to time near the end of the project?

A. That was the last work we did.

Q. And is that the part of the project that was referred to by Mr. Sektnan, I believe, and I believe another witness, that the fine graders were working in the same hole with you?

A. That's right; this is it.

Q. All right, proceed, Mr. Darcy.

A. Number 45 shows structure number 290-91-92 in place ready to pour; number 46 shows the excavation for [532] number 294-A.

Q. Now, with reference to number 46, that excavation, was it in that condition, if you know, Mr. Darcy, when the Marci crew had left it and when your men first arrived for installation of forms?

A. That's right; that's the way it was when the carpenters got there to set forms.

(Testimony of Patrick L. Darcy.)

Q. Can you describe that, without reference to the picture, describe that particular excavation?

A. Well, just a square hole in the ground, absolutely vertical banks, the entire hole was dug by hand; it was one that they had missed previously and came back to dig later, and it was just six inches larger than the actual concrete dimensions of the structure, on all four sides.

Q. Was that excavation wide enough, then, to get your form panels in place?

A. No, it was impossible.

Q. Now, you say it was a square hole. Was that particular structure a square structure?

A. Yes, just a little square structure with an outlet gate on the side. The hole was approximately four and a half feet deep.

Q. How was it for depth?

Mr. Holman: I'm sorry, I just can't hear you. Four what deep? [533]

A. Four and a half feet deep. You mean for sub-grade?

Q. Yes, for sub-grade.

A. Well, the sub-grade was high.

Q. All right, you may proceed.

A. Number 47 shows structure number 346 revised, 347 revised, just poured.

Q. What do you mean by revised?

A. It is a structure that the Bureau of Reclamation had re-designed for a certain purpose at this particular station. Number 48 is another picture of the opposite side of the same structure. Number 49 is structure number 368 revised, 369 revised.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I'm awfully sorry, but I wonder if you can't either talk a little louder or a little slower or something?

(Whereupon, the reporter read the last previous answer.)

A. Number 50 is number 345-A.

Q. Now, that's what 345-A what?

A. Structure number 345-A. Number 51 is structure number 342 revised and 343 revised. Number 52 is structure number 344, number 52 is structure number 426, number 54 is structure number 447-448, number 55 is structure number 339, revised, 340, revised. Number 56 is structure number 415-A, number 57 shows one of the [534] standard weir box inside form sections; number 58 is another view of the same thing; number 59 is another angle of the same subject, and number 61 also.

The Court: How about 60?

A. No. 60 is a completed back filled structure that has been in service a portion of one season, structure number 275-B, 275-C.

Q. Now, that structure, or picture number 60, was taken, then, I take it, sometime after the completion of the project?

A. That was one I have no date on. It was taken in the fall of 1945.

Q. It has no particular value except to show one of them that's in use, I take it?

A. That was all it was for. Number 62 shows the turbine chute, inside form sections, finished with

(Testimony of Patrick L. Darcy.)

and cleaned and returned to the yard, stacked, ready for delivery to Macri and Company; number 63 is another view of the same material; number 64 shows the other types of forms, outside panels for chute and loose lumber cleaned and stacked, ready for delivery.

Mr. Holman: Those are in the job yard, weren't they?

A. In the job yard; 65 shows approximately all of the inside form sections for the turbine chute, and some of [535] the outside form panels, ready for delivery. Number 66 shows a Macri truck from 1068 loading some of the inside chute form sections to take to 1068. Number 67 and 68 are two views of number 427-428, of which the demonstration excavation and structure were made.

Q. Now, you refer to structure numbers?

A. 427-428.

Q. You say those are the structures to which the models refer?

A. Yes. Number 69 shows my pick-up with a load of the final bit of equipment, ready to go to Portland.

Q. On what date?

A. That was on the morning of April 8, 1945.

The Court: Was that 69? A. Number 69.

The Court: Returning to 68, here, you say that is number 427-428. Isn't that just one structure that is shown in the model here?

A. That is two structures.

The Court: All right.

(Testimony of Patrick L. Darcy.)

Q. It is one excavation.

The Court: Oh, I see, one excavation and two structures.

Q. That's right. Then getting back to this picture 69, do I understand that's a picture of you ready to go home after finishing 1062? [536]

A. Say that over.

Q. Do I understand that's a picture of your pick-up loaded up and ready to go home, after 1062?

A. That was it.

Q. It is all by itself in the center of the page, and looked like a finale of 1062.

A. Correct.

Q. Now, commencing with 70 and continuing through to the end of these pictures, do they now relate to job 1068?

A. Yes, these are from 1068.

Q. All right.

A. Number 70 shows a view of the stock of lumber they had on hand in 1068 job yard on December 15, 1944. Number 71 shows my pick-up in front of the only thing they had there at that time to represent an office. Number 72 shows the stock of lumber from the back side, from the back yard.

Q. On what date?

A. These were all taken the same date, the same day, December 15, '44. Number 73 shows the batching plant set up, and cement shed at the stock pile at 1068. Number 74, the same date, shows the saw shed and aforementioned office at 1068. Number 75 is a shot from a little further back, showing the

(Testimony of Patrick L. Darcy.)

entire area of 1068 stock pile, office and yard. Number 76 shows the assembly tables and pile [537] of material behind the office.

Q. On what date was that taken?

A. All these previous pictures, and this down to here were taken on the 15th of December, 1944.

Q. And down to here, you mean including 76?

A. Number 76.

Q. Now, Mr. Darcy, those last pictures to which you have referred with reference to the tables there, and the yard, what was being done at those yards, do you know? A. Nothing.

Q. Did those yards have anything to do with excavations or with the set-up in connection with excavations, if you know, or would it be for making forms?

A. Well, that's where the form panels would be built to go in the excavations.

Q. All right, proceed with 77.

A. Number 77 is a picture of M. C. Schaefer and C. E. Hewitt in excavation number 13, 14, 15, on 1068.

Q. Taken on what date?

A. February 9, 1945.

Q. Number 78?

Mr. Holman: Pardon me; where were they? Where was that?

A. Structure number, you mean?

Mr. Holman: Yes. [538]

A. That was number 13, 14, and 15, on 1068. Number 78 is another picture of C. E. Hewitt and

(Testimony of Patrick L. Darcy.)

M. C. Schaefer in the same structure excavation, different angle, same date.

Q. Now, that is a structure on 1068, I mean an excavation on 1068?

A. Yes. Number 79 shows Mr. McKelvey, Mr. Kelley, Mr. C. E. Hewitt, and Mr. M. C. Schaefer.

Mr. Holman: Just for the purpose of identification, McKelvey was your attorney; who else was there?

A. Mr. Kelley of McKelvey's office.

Mr. Holman: Your attorney's office; who else?

A. Mr. C. E. Hewitt, a licensed engineer from Yakima.

Mr. Holman: Who was he, one of your employees?

A. Yes, on the job at the time.

Mr. Holman: For litigation now?

A. Yes.

Mr. Olson: Well, I object to that. He was there checking for us. We hoped to get it settled at that time.

Mr. Holman: Well, O.K., checking engineer; and who else?

A. M. C. Schaefer, and they are shown in an un-numbered excavation, rough, as the shovel had dug it, on 1068.

Mr. Holman: You can't identify that structure, that excavation? [539]

A. There were no reference stakes left there to identify the excavation by.

(Testimony of Patrick L. Darcy.)

Q. These next pictures are still taken on what date?

A. They were taken on the same date, February 9, 1945. Number 80 shows three forms, that is, three complete forms, on the assembly slab at 1068 stock yard, apparently ready to be delivered to the field. Number 81 shows the rough or partially fine graded excavation at number 12 on 1068.

Q. As it was on what date?

A. February 9, 1945. These next four pictures, down to and including 85, were all taken the same date, February 9, 1945. 82 shows method of assembling forms, 1068 stock yard; 83 shows three structure forms assembled at 1068 yard ready to go to the field; 84 shows a pipe collar section, Macri built form, with a tile block placed in it; number 85 shows one double, on triple, and a double in the background, of assembled forms in the stock yard at 1068 ready to go to the field.

Q. Mr. Darcy, returning to picture number 84, explain how that type of construction differed, if any, from the type of construction followed on 1062 with reference to the installation of the first pipe.

Mr. Holman: Your Honor, I object to that as immaterial, as long as it was not the operations of the [540] plaintiff.

The Court: Overruled.

A. This type of tile block is made of wood, takes a considerable time to cut all the pieces and assemble them, whereas on 1062 an eccentric metal

(Testimony of Patrick L. Darcy.)

cone was used to place between the tile and the inside face of the form, to make the connection of the tile to the structure.

Q. All right, proceed.

Mr. Holman: It sounds here as if you say tile; is that it, t-i-l-e?

A. That's right. Number 86 is form for structure number 73, revised, on 1068, in place, not poured. Number 87 is structure number 66 and 67 on 1068, the last structure poured on 3/5/45.

Mr. Holman: Was that picture taken 3/5/45?

A. That's right. 86 was also taken on that date.

Mr. Holman: Oh, everything before 86 was taken on 2/9?

A. That's right.

Mr. Holman: And what was this date?

A. 3/5/45.

The Court: And that is beginning with 85?

A. Beginning with 86. Number 88 shows a double structure—it is a triple structure, number 52, 53, 54, on 1068, which has just been stripped, showing the concrete, unfinished. [541] Number 89 is another view of the same structure from a different angle, showing it more completely. Number 90, end of lateral tile lining outlet, delivery form number 80. Now a series of five pictures taken February 23, 1945, number 91 showing the setting crane in the field at 1068, where the structure is being swung into place, just about ready to turn loose of it. Number 92 is the same thing, with the structure up in the air as it is being swung around by the crane from the truck.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Do you have the station or the structure number?

A. Number 39. Number 93 shows the crane backed up to the flat-bed truck that delivered the form to the field, preparing to lift it off the truck; number 94 shows the crane waiting for the flat-bed truck to back up with the form on. Number 95 is in the yard at 1068, shows the yard crane hooked to a double structure, ready to load it on the flat-bed to go to the field. Number 96—four pictures on this page, all of the same date.

Mr. Holman: What is the date?

A. The same date as the last five I gave you.

Mr. Holman: February 23, '45?

A. Yes. Number 96 is the flat-bed truck with two forms loaded on it, to go to the field. Number 97 shows the [542] stock yard at 1068, with form stock in the yard. Number 98 is a triple structure at 1068 stock yard, ready to go to the field. Number 99 is of the form yard down there showing several forms partially assembled, some fully assembled, some ready to go to the field. That's it.

The Court: I think at this point the record should show that the numbers to which the witness has been referring are sub-numbers of plaintiff's identification 49.

Witness: Your Honor, I have a correction I would like to have shown in the record. In cross-examination a while ago I used one man's name where I meant another one, in reference to ordering lumber. I meant Vern Ashley as Macri's foreman; I referred to Mose Stickney.

(Testimony of Patrick L. Darcy.)

The Court: Now, you're through with the picture part of the examination?

Mr. Olson: I now offer——

The Court: Well, first, let's have cross-examination on the identification.

Mr. Olson: I have some further examination, but not particularly related to the introduction of these pictures.

The Court: Well, let's see, we interrupted cross-examination to identify the pictures. Now let's go ahead with the pictures and have cross-examination on the [543] pictures, Mr. Holman.

Mr. Holman: Before I go on? I haven't finished my cross-examination.

The Court: Well, I understand that. I thought we'll better get the pictures out of the way.

Mr. Holman: May I ask one further question with reference to his voluntary statement?

The Court: Yes.

Further Cross-Examination

By Mr. Holman:

Q. During the recess did you talk with Mr. Stickney as to whether or not you had given him that list? A. No.

Q. You just thought of it, did not have a check made?

A. I checked the record myself.

Q. All right. In any of these pictures which were taken which you have identified, was any representative of Macri and Company present or notified the pictures would be taken? A. No.

(Testimony of Patrick L. Darcy.)

Q. Was any notification of any kind given any representative of Macri and Company in advance that the pictures would be taken?

A. Yes, Sam Burnsed and Mr. McCarthy.

Q. What about that?

A. Mr. Sam Burnsed and Mr. McCarthy. [544]

Q. With respect to 1068, or 1062?

A. 1068.

Q. I'm talking about 1062. A. No.

Q. The Court made the rule we were talking about 1062 unless we specified 1068.

A. No.

Q. I move that be stricken.

A. Which?

Mr. Holman: Your Honor, I can save time if I strike the question and the answer.

The Court: Strike the question and the answer, then, the last question and answer.

Q. Mr. Darcy, I'm asking with respect to 1062, was any notice given to Macri and Company in advance of taking any of the pictures covering 1062, so they could be present? A. No.

Q. No writing at all? A. No.

Q. Now, you say with respect to 1068 that you had notified Burnsed and McCarthy?

A. That's right.

Mr. Holman: Those are defendants named in this case, I think, Mr. Olson; didn't you name them as defendants? [545]

Mr. Olson: No.

(Testimony of Patrick L. Darcy.)

Mr. Holman: They were in some cases, but not this case.

Mr. Olson: Well, I haven't named them. They are just people working for Mr. Macri, as I understand it.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you give them any written notice or make any appointment?

A. One written notice.

Q. And was that at the time Mr. McKelvey and Mr. Kelley and the engineer, Hewitt, were there taking pictures?

A. No, that was on the 23rd of February, when I took those other pictures.

Q. Each of these pictures, to the best of your knowledge and belief, show an impartial and fair representation of the condition as found on the ground at the time?

A. That's right.

Q. Now, with respect to 1068, Mr. Darcy, the pictures numbered 70 to 76 I believe you said were taken on December 15, 1944; do you recall?

A. Yes.

Q. And you made the comment with respect to that, that there was nothing being done on those days?

A. At the stock yard there. [546]

Q. Yes. Did you infer by that, did you intend to include in that, that there were no operations being done anywhere on 1068 at that time?

A. No.

(Testimony of Patrick L. Darcy.)

Q. I see; and when you spoke of nothing being done, were you speaking of the crew of Concrete Construction Company, or the Macri crew?

A. Macri operations only.

Q. And what was the situation with respect to the crew of Concrete Construction Company?

A. On 1068?

Q. Yes.

A. We were having nothing to do with it.

Q. Sir?

A. We were having nothing to do with it.

Q. Well, when you say you were having nothing to do with it, you mean you were not working on 1068?

A. No, we weren't on it; we hadn't even been down there, except for me to keep track of operations.

Q. Mr. Darcy, I want to be exact on this. When you say "we" you mean the Concrete Construction Company; is that what you mean?

A. Any operations crew.

Q. Of the Concrete Construction Company?

A. Yes. [547]

Q. All right; was that so by virtue of instructions received—were you on the ground at that time, on the job?

A. You mean when those pictures were taken?

Q. Yes.

A. I was operating on 1062, and had gone on to 1068 to take the pictures.

(Testimony of Patrick L. Darcy.)

Q. Yes; now, that wasn't the day that the engineer reported your crew was waiting for you, was it?

A. That was a couple of days later.

Q. So on this date of December 15, was your crew working? A. Yes.

Q. And you were taking pictures?

A. For a while.

Mr. Holman: Your Honor, it's pretty hard to get right through the whole 90 very fast, but subject to wanting to refer to a particular picture in cross-examination, that's enough preliminary for me.

The Court: Well, what we're trying to do now is to examine this witness as to the admissibility of the pictures.

Mr. Hawkins: I have no cross-examination, however, I would like to request the witness at this time during the noon hour, if he could select the pictures that show poor excavation, that will facilitate my cross-examination [548] later.

Witness: For that project?

Mr. Hawkins: 1062.

The Court: Do you have any questions, Mr Ivy?

Mr. Ivy: No, your Honor.

Mr. Olson: We offer in evidence, your Honor, plaintiff's identification 49.

The Court: Are there any objections?

Mr. Holman: No objection, as being admitted for the purpose of illustrating the testimony of the various witnesses, your Honor.

(Testimony of Patrick L. Darcy.)

Mr. Olson: Well, of course, we're offering them to show what they show.

Mr. Holman: They speak for themselves.

The Court: Well, it will be admitted, plaintiff's identification 49, which includes sub-numbers 1 to 99 inclusive.

(Whereupon, plaintiff's exhibit No. 49 for identification was admitted in evidence.)

Mr. Hawkins: I wonder if the witness during the noon hour also would refresh his recollection as to the total yardage that was poured out on 1062, and the total number of structures on 1062.

Witness: Total number of structures, and the total concrete? [549]

Mr. Hawkins: Yes. Do you understand that?

Mr. Holman: And would you also, Mr. Darcy, refer to the payroll and tell me whether or not you were entered as superintendent? I asked him previously, your Honor, to check the Concrete payrolls and see if he was at any time—what his listing was, and he hasn't done it, and I want him again to check it. They're here.

Mr. Olson: I'm going to object to the witness testifying. It isn't a payroll he made up. I don't see what it proves in the first place, and I want Mr. Darcy to have lunch here. He's apparently going to be on the stand some time.

Mr. Holman: I don't want to burden him, but I want to save a lot of time handling so many sheets.

(Testimony of Patrick L. Darcy.)

The Court: It doesn't seem to me his testimony about something he didn't prepare or have anything to do with preparing would be admissible, if objected to.

Mr. Holman: I'll withdraw the request.

The Court: The request made by Mr. Hawkins you may do, or such as you have time to do after taking a reasonable time for lunch. I don't want you to go without lunch and work all recess. We'll recess now until 1:30.

(Recess until 1:30 o'clock p.m.)

Yakima, Washington, February 27, 1947,
1:30 o'Clock P.M. [550]

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Darcy, would you please refer to your record and read the note you entered at the time about notifying or giving Ashley a list of the lumber? You said you had a note, a diary note.

A. Well, I haven't that diary up here.

Q. You said you consulted something and found it was Ashley instead of Stickney, didn't you?

A. Well, I didn't bring it up here.

Q. Well, can you get it here?

(Testimony of Patrick L. Darcy.)

Mr. Olson: Which do you want, Mr. Darcy?

A. The first diary, the one with the silver map on the front.

Q. While they're getting that, Mr. Darcy, was any of the lumber which was furnished by Macri and Company used for the purpose of constructing any sheds or other facilities?

A. Temporarily, yes.

Q. How much lumber, and what type?

A. I don't think I ever listed any footage on it.

Q. Well, give me your best judgment.

A. Approximately 800 board feet of ship-lap, and about 20 pieces of 4 by 4, 12 foot long.

Q. Twenty, 4 by 4, 12 feet; what would that be, roughly? Can you give me the total board feet?

A. Do you mean of the 4 by 4?

Q. Yes.

A. Not without stopping to figure it out. I don't know exactly how many pieces of 4 by 4 we used, right off-hand.

Q. About twenty—well, about a thousand feet of lumber, would you say, or more than that?

A. About a thousand feet.

Q. And was that new lumber?

A. No, it was used lumber.

Q. What do you mean by used; had been used on the structures before?

A. Some of it had been used in structures before; some of it had been used around the yard there, for shed roof, or covering machinery or supplies.

(Testimony of Patrick L. Darcy.)

Q. Yes, but it had arrived on the yard as new lumber? A. I imagine it had.

Q. I don't want imagination.

A. I wasn't there; I don't know.

Q. O.K. You used lumber once, did you, for jacking up or holding up the Mixomobile, for repairs?

A. We used some lumber at that time.

Q. How much did you use at that time?

A. About 200 board feet.

Q. 200 board feet of what kind of lumber? [552]

A. Stuff that was brought on for shoring, blocking; 3 by 8, I think it was.

Q. And that was used for the purpose of holding up this nine ton Mixomobile while the repairs were being made under it? A. That's right.

Q. And was that lumber which arrived on the job for the purpose of structure excavation? I should say for forms?

A. Well, not for forms; for shoring, blocking, on the larger structures, up on the turbine lateral.

Q. For what? A. Shoring; blocks.

Q. Yes, sir, and how long was that used as a support for the Mixomobile?

A. Oh, about three, or part of a fourth day, I think.

Q. Three or four days; yes, sir. You took no picture of that, did you? A. No.

Q. Did you take any picture of the shed showing the portion that you had built with the form lumber?

A. No. At the time I didn't have a camera.

(Testimony of Patrick L. Darcy.)

Q. And when you were back later, you didn't take any picture of that portion, did you?

A. We took that down a few days after it was built, and returned it to stock. [553]

Q. Sir?

A. We took that down a few days after it was built, and returned it to stock.

Q. Now, is that some of the second hand lumber you were talking about on direct examination, or not?

A. Of what date?

Q. This lumber, was that some of the second hand lumber that you talked about on direct examination? You remember you said a lot of the lumber was second hand, did you not?

A. No, that wasn't part of that.

Q. That wasn't part of that?

A. No.

Q. Then that was new lumber that was used?

A. Some of it.

Q. Would you take that she-bolt a minute, Mr. Darcy, to the stand there? I want to ask you some questions about it, the she-bolt, plaintiff's Exhibit 44. Just sit over at the stand there, will you, so the reporter can get your answers? As you now hold it, it is complete and extended?

A. Yes.

Q. Subject to tightening to hold the walls together, that's right, isn't it? Now, then, will you dis-assemble it so that there is one arm and the cone? All right. Now, do you have a rule?

A. No. [554]

(Testimony of Patrick L. Darcy.)

Q. Have you a rule, Mr. Clerk? Will you please measure the distance from the end—this doesn't come off—from the end to the end of the tapered end of this portion, which is—what would you call this?

A. That is the male section.

Q. All right, of the male section. That's kind of tough to measure that.

A. Eleven and a half inches.

Q. Yes, sir. Now, then, is it or is it not a fact that eleven and a half inches of space would permit the removal of this? If I had twelve inches out here, this could be removed, could it not?

A. Yes.

Q. And does the cone come off with it?

A. No, the cone stays inside the form.

Q. Do you leave that in, Mr. Darcy?

A. No, that is removed after the form is removed.

Q. But is it removed by putting some sort of a lug in there?

A. A wrench fits in that hole.

Q. Oh, I see, it has a square hole in there, and you have a wrench with a square head that fits in there, and you unscrew that?

A. Made to fit that.

Q. And the wrench is also made for about the same over-all length as this, or less? [555]

A. The wrench is about a foot long.

Q. We agreed this was about a foot long, wasn't it?

A. Well, the wrench is a different shape.

(Testimony of Patrick L. Darcy.)

Q. I understand; I'm talking about the overall length; about the same? A. Yes.

Q. O.K. Your Honor, I would like to have a sub-identification, if I may, of this portion of plaintiff's 44.

(Whereupon, a portion of plaintiff's Exhibit 44 was marked Defendant Macri's Exhibit No. 44-a.)

Q. This portion of the she-bolt we've been talking about is now marked 44-a. Now, the she-bolt, 44, including 44-a inserted is, I believe you said, a standard she-bolt you obtained from stock?

A. Yes.

Q. And that is the standard she-bolt used for concrete structures upon reclamation projects, is it not? A. At that time.

Q. I mean at that time, sir. A. Yes.

Q. Was it you who said that the government required the use of that she-bolt?

A. I wasn't there at the time that was made.

Q. All right. Now, would you please, with reference to 25, [556] step over here, Mr. Darcy? Would you remove 26? Thank you. Now, in 25 you spoke of the side walls being at the neat line?

A. These.

Q. Yes. May I have those marked, Mr. Clerk? I want to indicate those two side walls, if I may. Will you point them out, please?

(Whereupon, a portion of Plaintiff's Exhibit No. 25 was marked 25-a and 25-b.)

(Testimony of Patrick L. Darcy.)

Q. Now, with reference to 25a and 25b, you spoke of that as being excavated at the neat line?

A. Yes.

Q. Does that mean—what does it mean? Does it not mean that there was a form set against 25a and 25b, or the dirt was used?

A. The dirt was used to pour the concrete against.

Q. I mis-spoke myself to your Honor when your Honor inquired once if I contended—I forgot about the bottom of the structure; and that is normal practice where there is depression below the floor of the structure?

A. That has to be, where there is a raise from one elevation to the other, where it is impossible—

Q. I say, that is standard practice. Now, with respect to—what do you call these?

A. We call them curtain walls, or sub-walls.

(Whereupon, portions of Plaintiff's Exhibit No. 25 were marked 25-c, 25-d and 25-e.)

Q. 25c and 25d are what you call curtain walls?

A. We call them sub-walls.

Q. Those are put in, are they not, for the purpose of concrete entering to anchor the structure?

A. Not to anchor it; to protect against sub-wash.

Q. Yes, sub-wash, I think that was your testimony; and 2b would run clear to the full length of your model, wouldn't it? A. No.

Q. How far would it run?

(Testimony of Patrick L. Darcy.)

A. To the outside, approximately at this angle, a little bit more where the form would face against that, stopping the concrete here, on the raise of this wall here.

(Whereupon, portions of Plaintiff's Exhibit No. 25 were marked 25-f and 25-g.)

Q. Then it would run approximately just beyond the depression which is marked 25g and 25f; that's right, isn't it? A. Yes.

Q. And the earth itself then would be used, with a form only on the outside that far?

A. Yes.

Q. The form from there on to the side of the model?

A. There is no form out that way. [558]

Q. There is no form?

A. That's where the tile comes through.

Q. Then the structure is not in this part at all?

A. No.

Q. And there is no operation required beyond the limits of 25g plus the wall, in the operations of the Concrete Construction Company? A. No.

Q. All right, sir. Is there any operation with respect to 25c or 25d, of the Concrete Construction Company?

A. Except to fill it with concrete.

Q. That's filled with concrete; now, 25e and 25f are braces, are they not, so that the concrete will conform to that?

A. Yes, it is a corner re-inforcement.

(Testimony of Patrick L. Darcy.)

Q. Now, then, 25e and 25f again are places where the earth is used as a bottom?

A. Yes.

Q. Yes; and is there any danger in the preparing of the form, to damage the excavation at 25e and 25f, by the carpenter's movements?

A. Excavations like this, where there isn't room enough to work, there is, possibly.

Q. Well, regardless of whether there is room enough to work or not, is there danger of that being injured by the carpenter's movements? [559]

A. That's the right answer I gave you. In this there is, and in that one there isn't.

Mr. Olson: You're referring to the——

A. 23 ideal, and 25 actual, is what I'm referring to.

Q. With reference to exhibit 25, then, were those 25e and 25f portions damaged by your carpenters?

A. No, they weren't even made when we got there. We put those in ourselves.

Q. Now, in practice, in the field, are those made by the excavator, or not?

A. They are supposed to be made by the excavator.

Q. Are they in practice, or not?

A. I wouldn't know, because I've had no opportunity to check any other operation.

Q. And in practice is it or is it not a fact that 25e and 25d are made or not made in the excavation?

Mr. Olson: That question is objected to, your Honor, unless he's asking if it was the practice of

(Testimony of Patrick L. Darcy.)

Macri and Company in this case to make them. Whether or not it was the practice on some other job is immaterial, because in this case Mr. Macri was to do the excavating.

Mr. Holman: I'm asking as to practice, your Honor, as between the two operations.

The Court: Well, it isn't specifically covered in the sub-contract, as I understand it, who was to do [560] the particular parts of the excavation.

Mr. Olson: I think it is, your Honor, that Marci was to do all the excavating.

Mr. Holman: Your Honor, I merely want to get the factual end of this. I'm not interested in any legal position.

Mr. Olson: Does your question relate to this job, then?

Mr. Holman: It relates to this man's practice.

The Court: I'll sustain the objection to that. If it is covered by the contract it doesn't seem to me the question is relevant.

Mr. Holman: I agree with your Honor's position, but I was trying to get the—all right, I'll withdraw that.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you say on this job, what has been marked 25c, d, e, and f and g were done by you folks? A. That's right.

Q. By Concrete Construction Company?

A. By Concrete Construction Company, yes.

(Testimony of Patrick L. Darcy.)

Q. And was that done because Macri and Company's fine graders would not return to do it?

A. At the time they apparently didn't have anybody available to send back to do it. [561]

Mr. Holman: I move the answer be stricken, your Honor. My question, I think, is very clear.

The Court: What is the question?

(Whereupon, the reporter read the last previous question.)

The Court: I'll let the answer stand. You asked him the reason.

Q. Why do you say apparently?

A. Because I had requested all these structures that had things wrong, that I had checked, to be corrected. There was a number of them on that lateral, and since nobody was returned to do the work, we had to do it ourselves to keep from waiting a couple of days.

Q. Didn't you say on the stand that both your carpenter crew and the fine graders were working on this structure at the same time?

A. Not this one.

Q. I see; I misunderstood you. Was there any fine grade work on this structure at all?

A. As I said before, all this fine grade work, including these two neat cuts, we had to do, because we couldn't wait for them to get somebody back to do it.

Q. And how long had the excavation stood until you put your forms in it?

(Testimony of Patrick L. Darcy.)

A. From the time they fine graded it until we got there. [562]

Q. How long was that?

A. About three or four days.

Q. In other words, it stood three or four days?

A. Before we got to it with the forms.

Q. Now, do you say or do you not say that the fine graders worked or did not work upon the structure represented by 25—fine graders worked or did not work upon the structure represented by 25 in advance of your placing the structure, 26, in it?

A. They had worked in it previous to us getting there, but it wasn't right.

Q. All right. Did you give any notice as to any of the claimed irregularities in the structure excavation represented by 25? You shook your head, no?

A. I wasn't quite ready to make that answer; pardon me; I was just thinking. The complaint I made was oral, to the operating superintendent of Macri's work.

Q. What do you mean by "forward"?

A. What is it?

Q. What do you mean by "forward" to the suprintendent? A. I said it was oral.

The Court: Made orally.

Q. Orally? A. Yes.

Q. When? [563]

A. Whatever day the record shows we started to work on this would be the day that I had found him and told him the excavation was wrong.

Q. And who was that superintendent?

(Testimony of Patrick L. Darcy.)

A. That would be Sam King.

Q. Sam who? A. King.

Q. And the structure is what?

A. 427-428.

Q. When you say sub-fillets would you identify those?

A. That is what you had marked e, f and g.

Q. Thank you. Now, if you'll take the stand. At the time you took the photographs, February 23, 1944, and in—I think that's the last date you took photographs, wasn't it—and March; February 23 and March 5, February 9 with respect to 1068, you were informed, had been informed, that Macri and Company had served formal notice upon Concrete Construction Company that their contract was terminated for non-performance, had you not?

A. I knew that we had been notified that they were going to take over.

Q. That they would take over as of the date of January 3, you knew that, didn't you?

A. Approximately there.

Q. So when you answered that you did not go on to that job [564] at all, you did no work after getting the notice that the job was terminated?

A. No.

Q. And that would hold also, of course, for your picture of April 8; there is one picture of April 8. Now, with reference to excavation 294-A, in which in identifying the picture you said that it showed the structure in the condition Macri left it, square hole, entirely dug by hand, six inches larger than the actual concrete of the structure—correct?

A. That's right.

(Testimony of Patrick L. Darcy.)

Q. Did you call Macri's crew back to fine grade that, or not? A. Yes, I did.

Q. And who did you call?

A. James Black, in charge of fine grading.

Q. James Black; and did he fine grade it?

A. Yes, it was enlarged so we could get the form in it.

Q. Then, when you took this picture, had it been enlarged, or not? A. Not yet, then.

Q. But you didn't take any picture after it had been enlarged to show the correct fine grading?

A. No, because it was a foggy day, and I couldn't get a picture of it.

Q. Oh, that's the fog picture that you didn't put it? [565] A. Yes.

Q. May I have that for identification, please?

The Court: What is the number that you're talking about now, Mr. Holman?

Mr. Holman: It hasn't been identified.

The Court: No, I mean the one you just got through with.

Mr. Holman: 49-6, your Honor. Will you mark this for identification, Mr. Clerk, Macri's sub-number, if you can?

The Court: Sub of this one?

Mr. Holman: Yes, that will be all right with me.

The Court: I don't think it could be marked as a sub of 49, because 49 is all plaintiff's. Mark it Macri's.

(Testimony of Patrick L. Darcy.)

(Whereupon, photograph taken by Darcy was marked Defendant Macri's Exhibit No. 50 for identification.)

Q. Handing you what has been marked Macri's 50, is that the photograph you say you attempted to take, but on account of the fog you couldn't take it?

A. That's it. It is marked upside down.

Q. Sorry, Mr. Clerk. That's one on you. Counsel, will you kindly hand me the prior book with the indorsement below that, made by Mr. Darcy? This one? I'm calling your attention to the indorsement you made below that picture [566] when it was taken; I'll read it: "Fog on project, daytime; 35 feet from camera two men were working setting forms." Did you make any memo at all that you tried to photograph this structure, and didn't?

A. No.

Mr. Holman: I offer in evidence identification 50, and I would like to have marked for identification—could you come here again, Mr. Olson? I would like to mark for identification, your Honor, this portion of the page which I've marked with pencil, and ask the Clerk to detach it from the rest.

The Court: Any objection to cutting that portion out, Mr. Olson?

Mr. Olson: None whatever.

The Court: Just cut that part out, and you won't have to bother with the rest.

(Testimony of Patrick L. Darcy.)

The Clerk: I'll mark that as 50-a, then I'll attach the picture right on it.

(Whereupon, Legend by Darcy re photograph (No. 50) was marked Defendant Macri's Exhibit No. 50-a for identification.)

Q. Let me have it before you attach it. Handing you what the Clerk has marked as 50-a, do you recognize that as the portion of the page I showed you when interrogating you just ahead of it being marked? [567] A. That's it.

Mr. Holman: I offer Macri's 50 and 50-a in evidence, your Honor.

The Court: Admitted.

(Whereupon, Defendant Macri's Exhibits No. 50 and 50-a for identification were admitted in evidence.)

Mr. Holman: That's all.

Cross-Examination

By Mr. Hawkins:

Q. With reference to Exhibit 23, Mr. Darcy, that is the model over there, you haven't shown the dirt piles on that model, that would result after the excavation has been completed?

A. You mean the one to specification?

Q. Yes.

A. The dirt should be piled back far enough out of the way so that a man would be able to work around the banks without kicking it in the hole. Naturally it wouldn't be shown there.

(Testimony of Patrick L. Darcy.)

Q. It would be beyond the border line of that box, is that right? A. Yes.

Q. That dirt is loose, is it not?

A. What is it?

Q. That dirt is loose when it is piled out like that? [568] A. Yes, it is quite loose.

Q. If the wind blows, it blows the dirt around?

A. More often it is lumpy, but not loose; it is easy to kick it around.

Q. And it would be kicked into the hole?

A. That's right.

Q. And if you delayed three to five days after the form was excavated until you came along with the forms, that hole might get filled up, to a certain extent? A. If the dirt was dry.

Q. You built those models to the scale of 15/100 on the model, against one inch, on the model?

A. Well, it was 15/100 of a foot. I didn't get down quite that fine.

Q. Can you tell us what an inch on the model equals, out on the actual site? One inch on the model would equal what on the site? Can you figure that for us?

A. Approximately 1 and 20/100 of a foot.

Q. 1 and 20/100 of a foot? One inch equals 1.2 feet? A. Wait a minute; no.

Mr. Holman: Your Honor, while they're computing, the Clerk just called my attention to the fact I had not offered 44-a, part of the she-bolt. I do offer that as an exhibit.

(Testimony of Patrick L. Darcy.)

The Court: I think we had it marked as a sub-identification?

Mr. Holman: Yes.

The Court: Well, it may be admitted.

(Whereupon, Defendant Macri's Exhibit No. 44-a for identification was admitted in evidence.)

The Court: Wouldn't it be 1.8 inches to the foot? I just want to save time, counsel. What I say isn't binding.

A. Approximately. Did you want inches to feet?

Q. One inch on the model indicates one foot and how much of a foot on the field?

A. Approximately .78, or $8/10$.

Q. Of an inch, or a foot? A. Foot.

Q. In other words, one inch on the model equals $17/8$ feet?

Mr. Olson: No, he said it equals .8 of a foot.

The Court: $15/100$ of a foot would be $180/100$, or 1.8 inches to the foot, wouldn't it? I'm not an engineer, but it seems to me that would be the computation.

Q. When you have a half an inch on your model, how many inches does that equal?

A. What do you say?

Q. When you have a half inch on your model, what does that equal on the field? [570]

Mr. Olson: Now, if your Honor please, I think if it is broken down into inches, if we're going to go into half inches, and then quarter, it is all mathematical computations; I don't see the purpose of breaking it down.

(Testimony of Patrick L. Darcy.)

Mr. Hawkins: The point I'm getting at is simply this; the 2 by 4's are half an inch, actual size, on the model—now, if one inch equals 1.8 feet—is that right? I'm not just clear; if you have one inch on the model, what does that equal in the field? I just didn't get it. A. 8/10 of a foot.

Q. So if you have a half an inch, that's 4/10 of a foot? A. Yes.

Q. And you have your 2 by 4's or strongbacks square at a half an inch.

A. Well, they vary a little bit. Anything that small, you get a little bit of variation in cutting. They weren't finished.

Q. In other words, that model is not finished accurately to this 15/100 scale you're speaking of?

A. It's close enough to that scale you can't detect any variation.

Q. Well, a half inch doesn't represent the broad side of a 2 by 4?

A. Sufficiently for the purpose of reproduction in that scale.

Q. In your opinion, is that right? Did you check the number [571] of pictures that showed what you claimed were poor excavations? Can you give us the number of those pictures?

A. Do you want this list?

Q. Just read it off as you prepared it.

A. Picture number 25 and 26—or picture number 1; it is structure number 25 and 26.

Q. (By Mr. Olson): Just give us the picture numbers.

(Testimony of Patrick L. Darcy.)

A. All right; pictures number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 33, 35, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 67, 68; on 106.

Q. Now, there is some over-lapping there, isn't there? I mean you have more than one picture of the same excavation, isn't that right? A. Yes.

Q. How many different structures are involved in those pictures? A. 46.

Q. 46 different structures?

The Court: Do I understand that all of these are on 1068, all of the numbers?

Q. 1062 only.

The Court: 1062?

Q. Isn't that right, Mr. Darcy?

A. Yes.

Q. Now, then, do you know the total yardage of concrete [572] poured on 1062 by the Concrete Construction Company?

Mr. Holman: Object to that. your Honor, as immaterial, as not the best evidence. The best evidence would be the pay quantity by the Bureau, determinative upon all parties under the contract.

The Court: Well, if this witness knows, I'll permit him to answer. A. We poured 1572.47.

The Court: Give me that figure again, please.

A. 1572.47, not including one day's batching that we did ourselves.

Q. What do you mean by that?

A. We operated the batching plant, from where we got our aggregate supply. The owner and op-

(Testimony of Patrick L. Darcy.)

erator didn't have a man to operate, and we had to operate it ourselves, and we had no record of that day's batching, that is, that I had time to look up.

Q. That batching is not charged, is it?

A. No, that batching wasn't charged for that day.

Q. Now, yesterday I believe you testified as to the difficulties you had with the type of excavation exemplified by exhibit 25, and explain to the court how much easier it would have been had the excavation been as indicated by exhibit 23. Now, then, your testimony yesterday as to how much easier it would have been is [573] based upon an excavation similar to excavation or exhibit number 23, is that right?

A. Will you please repeat that one?

Q. Surely. Yesterday you testified that you had difficulties with the type of excavation such as exhibit 25?

A. Yes.

Q. And you explained to the court how much easier it would have been had you had the excavation exhibited by exhibit number 23?

A. That's right.

Q. And your testimony in that regard is based upon an excavation that is made exactly like number 23, is that right?

A. Not exactly like it, but sufficiently near to that.

Q. Substantially the same as 23, is that right?

A. Yes, to what these specifications call for.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I move that be stricken, your Honor, as a conclusion of the witness.

The Court: You mean what the specifications call for?

Mr. Holman: Yes.

The Court: Yes—well, I think that's what we're talking about, on the model drawn to the specifications, or his idea of them.

Mr. Holman: Yes, his idea.

The Court: Well, it is still his idea. I'll [574] overrule the objection.

Q. (By Mr. Hawkins): Your testimony is based on an excavation substantially similar to Exhibit 23? A. That's right.

Mr. Hawkins: I think that's all, Mr. Darcy.

Further Cross-Examination

By Mr. Holman:

Q. One more question, Mr. Darcy. In answer to counsel, you gave the total yardage poured; poured, did you A. Yes.

Q. Of 1572.47? A. Yes.

Q. In the event that the final estimate of the government as to pay quantity shows a total of 1356.697 cubic yards, what is your explanation for the difference?

A. That was consumed in over-run, filling voids that was over-excavated.

Q. Are you giving me an amount at the mixer, or the amount as poured?

(Testimony of Patrick L. Darcy.)

A. I'm giving you the amounts that were screened at the bunker.

Q. Screened by whom?

A. By the bunker operators.

Q. Yes; in other words, you're giving me that at the the bunker, then there is spillage. is there not, in the field?

A. You mean of the concrete? [575]

Q. Yes.

A. As registered on the report of the Bureau of Reclamation engineers, which only showed two occasions there was any spillage, less than a half yard.

Q. Then you say that regardless of the quantity measured by the government as completed concrete structures, the actual quantity poured was 1572.47?

Mr. Olson: That question is objected to, your Honor, because the Bureau of Reclamation didn't measure the quantity of concrete poured.

The Court: Well, I think he's already explained it. He said it was overage, to fill holes that the Bureau didn't pay for.

Mr. Olson: Then I object to the question being argumentative.

Q. Does that include or exclude spillages?

The Court: He said that it excludes spillages, didn't he?

Witness: No, it would include what little spillage there was.

Mr. Olson: Which was how much?

A. According to the inspector's report, there

(Testimony of Patrick L. Darcy.)

was less than a yard reported in spillage, altogether.

Mr. Holman: I move that answer be stricken until the witness identifies the report. [576]

A. All right, there was less than a yard of spillage or waste.

The Court: The reference to the report may be stricken. It isn't identified or referred to specifically.

Mr. Holman: Thank you, that's all.

Cross-Examination

By Mr. Ivy:

Q. Mr. Darcy, I believe that you stated that this job 1062 could have been completed in three and a half months? A. Yes.

Q. That's by the Concrete Construction Company? A. Yes, our part of the work.

Q. Were you on this job from its inception, 1062? A. No.

Q. You went on there in June, did you?

A. 29th of June, 1944.

Q. And you were there until April 10 or so, when the job was completed?

A. April 8 I left.

Q. And from a date in June to April you were the one that turned in the time records, were you?

A. Not until the 8th of August did I turn in a report.

Q. And from about that time, then, you made the reports to the Portland office of progress on the job, time records, and expenses? A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Did you segregate in those reports any of the items that you had complained of regarding the work that was performed under the direction of Concrete Construction Company that Macri Company was supposed to have done?

A. Yes, on those reports there is a record of it, that they have at the main office.

Q. Did those reports show the time that you yourself spent on 1068?

A. The reports show every time that I was down there, and how many hours of time I spent there.

Q. The excavation that you spoke of with reference to the model, 25, was performed by Concrete Construction Company men, is that true?

A. Yes.

Q. And it's your understanding that should have been performed by Macri?

A. That's the fine grading, yes, and it should have been done by the Macri crew.

Q. What about the excavation?

A. The rough excavation, no.

Q. How about the trimming up?

A. They had made an attempt to do it, and it was wrong. We had to finish it out correctly ourselves.

Q. And that was their job?

A. That was their job. [578]

Q. And squaring up was their job?

A. Yes.

Q. Bringing to the proper level?

A. Proper elevations in all sections.

(Testimony of Patrick L. Darcy.)

Q. Did you keep track of the hours that were wasted by the carpenters in January and February, that you testified to?

A. There's a record of every hour every man put in, and what he did.

Q. There would be a record, then, of the time put in by carpenters doing nothing?

A. Well, it would be charged not as doing nothing, but as to field operations, some of it is actually marked for kill time.

The Court: I take it, then, there isn't any separate record of time when they didn't work, is that right?

A. Just occasions when it was definitely segregated it will be marked kill time on the time sheet.

Q. So the only segregation would be the reference to kill time, that is definite in your reports?

A. As to which?

Q. As to kill time? A. Yes.

Q. Now, will you relate again the specific items of work performed under your direction that you were complaining to [579] Maceri's superintendents about not doing themselves?

A. Fine grading, cribbing, back fill, setting the tile into the structures, and some of the road work we had to make to get into certain places, back filling some of the ditches to get the equipment through, and a few excavations we did, general excavating by hand, we dug sub-wall trenches, we cut sub-fillets out, that would be included in your back filling—I mean your fine grading: right at this minute that's all I recall.

(Testimony of Patrick L. Darcy.)

Q. And were there any times when there were delays in your operations by reason of Macri's failure to do certain work? A. Yes.

Q. Now, on all these matters that you've just testified to, did you make any notations or segregations indicating the man-power lost or the hours that were charged for that?

A. That's all on the time manifests.

Q. And specifically designated?

A. Designated as whatever heading it comes under.

Q. No, Mr. Darcy, I don't believe you're getting—you understand what I'm asking you; in making up your reports to your Portland headquarters did you specifically designate on those reports the amount of time or the amount of wages that were lost by reason of these matters you complain of, as far as Macri and Company are concerned? [580]

A. That's what I meant; excavating would be under the heading of excavating, every man, so many hours, whatever time he put in, whatever he was doing, is reported as such for the time he was doing it, on every report.

Q. So there's a way of going through your payroll records and fixing the amount of time chargeable to the delays and breach of contract by Macri?

A. That's right.

Mr. Ivy: That's all.

Mr. Hawkins: I have one further question, your Honor, on cross-examination.

The Court: All right.

(Testimony of Patrick L. Darcy.)

Further Cross-Examination

By Mr. Hawkins:

Q. In all of these pictures that you took, do you have any pictures of any of your men doing the finish grading? A. No, I haven't.

Mr. Hawkins: That's all.

Further Cross-Examination

By Mr. Holman:

Q. How many structures altogether were there, Mr. Darcy?

A. 549, including 28 standard weir walls.

Q. And you took photographs of how many? 46, I believe you said.

A. 46 I believe was what we counted.

Q. Did you take any photograph of any one where you claim the excavation was done right?

A. What did you say?

Q. Did you take any photograph of any one where you claim the excavation was done right?

A. There wasn't any to take.

Q. Will you answer my question, yes or no?

A. No.

Mr. Olson: I think he did, your Honor.

Q. Did you take any picture of any structure where fine grading was done right?

A. Not of the fine grading.

Q. You did not?

(Testimony of Patrick L. Darcy.)

A. I took the picture of the structure showing the exterior.

Q. I'm talking about the fine grading.

A. No.

Q. Did you take any picture of any structure showing fine grading as done by Macri, and then take another picture showing fine grading as done by your crew, after Macri's fine graders had left it?

A. No.

Mr. Holman: That's all.

The Court: All right; any redirect?

Mr. Olson: Yes, your Honor. When I put those pictures in I had withheld some examination with reference to 1068 until I got those pictures in.

Redirect Examination

By Mr. Olson:

Q. Now, Mr. Darcy, with reference to job number 1068, I gather from those pictures that you were there on December 15, 1944?

A. Which one was that, 1068?

Q. 1068, you were on that project?

A. On December 15?

Q. Yes. A. Yes.

Q. And what, if anything, did you do on 1068 with reference to inspection or otherwise going over 1068?

A. I just run down across a few laterals at the upper end, and down through the middle of the project, watching for any sign of operations, went down to the stock yard or the stock pile where the

(Testimony of Patrick L. Darcy.)

base or headquarters was to be established, checked in there to see what was there and what was being done.

Q. Did you know that prior to that date Mr. Schaefer had received a letter, which is in evidence, directing you to proceed with your structure work on 1068?

A. Yes, he had called me and told me that he had received the letter.

Q. I wanted to know if you knew about it.

A. I knew of it.

Q. And were there any excavations ready for placement of structures on 1068, on December 15, 1944? [583]

A. No, there were not.

Q. Were you aware or advised that Macri and Company had held the Concrete Construction Company in default on job 1068 by a letter written January 3, 1945, which is in evidence?

A. Yes.

Q. And did you subsequent to January 3, 1945, again go down to 1068?

A. Yes, I did.

Q. On what date?

A. The 5th of January.

Q. 1945?

A. '45.

Q. And were there on that date any excavations which were ready for structure placement?

A. No, there were none ready for structures.

Q. Were there any excavations there at that time?

A. There were about nine or ten rough excavations, that is, there were rough excavations for about nine or ten structures.

Q. And had they been fine graded?

A. No fine grading whatever.

(Testimony of Patrick L. Darcy.)

Q. So that could the Concrete Construction Company have placed any concrete structures or forms in those excavations up to and including January 5, 1945?

A. No, it would have been impossible. [584]

Q. And when did you next go on 1068?

A. January 9.

Q. Did you examine the excavations on that date? A. Yes.

Q. And were there any excavations then completed with fine grading and ready for installation of structures?

A. There were none completed until in February.

Q. Do you recall whether or not on that date Macri and Company were themselves preparing any of the structure forms?

A. I think they were starting to build some, or it looked like on the table some of the panels; they had established the yard and the decks that they were to work on, and a tool shed, and they had parts of panels on the table working on them at the time I was there.

Q. And when did you next go on 1068?

A. January 21.

Q. And what was the excavation situation on that date?

A. Well, they had a few more rough holes, but no fine grading.

Q. Were there any excavations on that date which were ready for placement of structures?

A. No, there weren't.

(Testimony of Patrick L. Darcy.)

Q. And what was Macri and Company doing, if anything, on that date with reference to building of the structure [585] panels or forms for 1068?

A. By that time they had built quite a few panels, and assembled a few simple forms, complete forms, in the yard on the assembly decks, ready to be hauled out on the field.

Q. Now, were you on 1068 again in January?

A. The next day, January 22.

Q. Did you examine the excavations on that date?

A. I think that's what I went down there for, was to see if they were starting the fine grading crew that morning, because that was the date the fine grading crew was supposed to move down there. Whether they did or not I couldn't find out.

Q. What was the condition on that date?

A. I couldn't find any fine graded, or anybody to do fine grading.

Q. What was the condition of the slopes of the banks of these excavations up to and including January 22, 1945?

A. Well, they were just as the bank would be if excavated by a hoe, a type of shovel, which is practically vertical.

Q. Now, when did you next go on 1068?

A. February 5.

Q. And what did you see on that date?

A. Fine graders were then working down about—oh, the ninth or tenth hole down on the first lateral. [586]

(Testimony of Patrick L. Darcy.)

Q. And what was going on in the yard, if anything, on 1068?

A. Well, the construction and assembly of forms in the yard.

Q. When was the next day you were down there?

A. February 7.

Q. Did you examine the excavations on that date?

A. Yes.

Q. And what did you observe?

A. Up to about number 10, and one in the east turbine lateral, seemed to be completed as to fine grading, and the yard was still under the production of form panels and parts assembling.

Q. And what was the condition of the excavation banks?

A. They were more vertical than the shovel had left them, or the hoe.

Mr. Holman: May I have that answer?

A. They were more vertical than the hoe had left them.

Q. And when were you on 1068 again?

A. February 9.

Q. And what did you find with reference to the excavations or structures on that date?

A. I think the fine graders then were down about 17 or 18; fine grading was still the same, it looked, and a couple we checked were accurate at the bottom, but the banks were still vertical on the sides, and very close to the outside, that is, the neat line of the concrete structure. [587]

(Testimony of Patrick L. Darcy.)

Q. That's the date that you testified, I believe, that Mr. McKelvey and Mr. Hewitt went over with you?

A. Yes, that's the date.

Q. Now, when did you go over the project again, if you did?

A. February 11.

Q. What was the situation with reference to the excavation and structure placement then?

A. They were as they had been two days before, with the exception of one or two holes that had been worked on, but didn't seem to be complete. The tools were still in the hole.

Q. Had there been any structure forms placed in the excavations?

Mr. Holman: Mr. Reporter, may I have the last answer?

Reporter: There wasn't any.

(Whereupon, the reporter read the last previous question.)

A. On February 11. No, there hadn't been.

Q. Counsel asked you on cross-examination if the Mixomobile was on the job, I believe, on June 29?

A. Yes, he did ask that.

Q. And you said it was not?

A. It wasn't.

Q. Why wasn't it? [588]

A. Because there wasn't sufficient progress ahead to guarantee that we would be able to function or operate economically right on through without having a long extended tie-up of such equipment.

(Testimony of Patrick L. Darcy.)

Q. Do you know how much work was then available for concrete pouring equipment?

A. Approximately two days' pour.

Q. Your equipment was then in Portland?

A. Yes.

Q. For the purpose of the record, Mr. Darcy, about how far is Portland from this job?

A. From the job there?

Q. Yes. A. It is 192 miles.

Q. Do you know how many days' concrete pouring you had ahead when you did bring up your machinery and equipment?

A. Approximately six days' pouring ahead, but enough forms out ahead to keep—we had a fairly reasonable assurance of being able to operate more or less continuously from there on, if things were to come through as oral agreements and progress at the time seemed to warrant.

Q. Now, counsel also asked you, Mr. Darcy, if there ever was a time when all of the lumber in the yard had been made into forms, and I believe you said no. Would you explain that? [589]

A. Well, there would be times that one type of lumber that would be used on forms, we wouldn't have the other type of lumber to go with that type to make forms. You can't use one dimension of lumber without the other dimension of lumber.

Q. Were there times, then, when you were entirely out of two by fours?

A. The majority of the time we were out of two by fours. When we did get two by fours they

(Testimony of Patrick L. Darcy.)

were nowhere near enough to fill the necessity, and they didn't last but just a little while.

Q. And were there times when you were entirely out of other types of lumber?

A. Then there were times when we might have a few two by fours, but we would be entirely out of ship-lap.

Q. And was it possible to make these forms without having on hand all four types of lumber?

A. I don't know how it would be done, no.

Q. Now, counsel has offered and the Court has received in evidence a picture that we might term the "fog picture," defendant Macri's Exhibit 50, and a notation below it that says defendant Macri's Exhibit 50-A. Are you able, Mr. Darcy, to explain the notation which appears on the bottom, the notation which appears as defendant Macri's Exhibit 50-A, with what I understood your testimony to be [590] that some men were in this hole excavating?

Mr. Holman: Objected to as leading, your Honor.

The Court: Well, in connection with his testimony; let's leave it there.

Mr. Olson: I asked if he can explain it. I don't know how that can lead him. Maybe he's going to say he can't explain it.

Mr. Holman: Well, we don't want counsel testifying.

Mr. Olson: I don't know what it's going to be.

(Testimony of Patrick L. Darcy.)

The Court: Can you answer that?

Witness: Well, if he wants me to explain the answer I gave to the question that was asked, my sole purpose in taking this picture was to have another picture of the same hole, showing that the side banks of this excavation were still extremely close to the structure and entirely vertical, but it is just one picture that I intended to have that I didn't get on account of elements.

Q. Well, as I understood counsel's question, at one time you said there was excavators working in the hole, and another time you said there was structures being put in the hole. I didn't understand it that way. Did I misunderstand that?

Mr. Holman: I challenge that, Mr. Olson. I don't think I said any such thing. [591]

Mr. Olson: I understood this witness said at one time there were excavators working there, when the picture was introduced, and then produced this album wherein he said it was the structure. Maybe I remember wrong. I don't want to waste any time on it.

A. The carpenters were preparing their forms to go in the hole here at the time I took the picture, but as I testified, they had returned and supposedly corrected the excavation. The fine graders weren't there.

Q. Now, Mr. Darcy, did you have foremen working under you? A. Yes.

Q. And I'm not asking for their identity, but as to the type of foremen, what foremen did you

(Testimony of Patrick L. Darcy.)

have with reference to the placing of concrete structures?

A. Yard foreman—placing of structures?

Q. Yes.

A. The only foreman I had under me that would be considered as a foreman was the yard foreman in preparation of panels for the structures. In the field they would just be considered as lead men.

Q. Lead men? A. Yes.

Q. And how about on the concrete crew, was there any foreman?

A. Yes, there was a foreman on the concrete crew. [592]

Q. Now, on cross-examination you said there was some lumber used in a shed, but the shed was taken down and the lumber returned to stock. What did you mean by lumber returned to stock?

A. Put right back on the pile in the yard where it had been taken from, and then consecutively used for form work.

(Whereupon, Graph made from time cards and daily reports was marked Plaintiff's Exhibit No. 51 for identification.)

Q. Now, showing you plaintiff's identification 51, Mr. Darcy, I'll ask you first who prepared that?

A. I prepared this.

Q. Would you state what it is?

A. It is a graph in code color showing every day of operation on 1062, every man employed on that day, and in code color what that man did on that day.

(Testimony of Patrick L. Darcy.)

Q. And each one of the little squares here represents what?

A. Each little square is a man day.

Q. Now, I notice certain graphs or lines going from the bottom part of the identification upwards.

A. Here?

Q. Yes. What do they indicate, in different colors?

A. They indicate the planned time of start and finish of each operation of the work that we were to do.

Q. And the planned time, how would that time correspond with [593] the time that it would take to properly complete this job if the excavations were made proper, lumber furnished on time and the proper quality, and the excavations made so that you could proceed with your work?

Mr. Holman: I object to that question as an improper question based upon assumptions that have not been established.

The Court: Will you read the question?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: My point, your Honor, is if he says "as you have stated" or something so he ties it to this witness, but counsel is making a general summary based upon assumption of the evidence up to this time. In other words, if counsel means if the banks had been on a one to one slope and certain features, that's all right.

(Testimony of Patrick L. Darcy.)

Mr. Olson: Well, I'm willing that the question be tied in with what Mr. Darcy has related as proper excavation.

Mr. Holman: I was objecting to this summary of the evidence to date.

Mr. Olson: I have no objection to it being tied in with what Mr. Darcy has said was the proper excavation.

The Court: It would necessarily have to be tied to this witness anyway, because it is his graph and his [594] idea of what it would be.

Mr. Holman: The only objection I had was counsel's statement making a summary of the Court's ultimate conclusion.

Mr. Olson: I'll further state the purpose of going into this exhibit, if it will assist the Court and counsel any.

The Court: Well, you might proceed with your identification.

Q. Do you have the question in mind?

A. Reporter, would you read that?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: That I understand is according to his testimony, Mr. Olson.

Q. And using the proper excavations as you have indicated in your testimony that they should be?

A. Well, based on past experience, relativity of operation comparisons, it would have come out

(Testimony of Patrick L. Darcy.)

very closely to what we had planned there, and that's what that mark was intended to be. When we take a job we figure our time, and with this exception we always hit that time for completion of the work.

Mr. Holman: I move that the answer be stricken, your Honor, as based on speculation and based on conclusion [595] of the witness, who is not testifying as an expert, but as a factual witness.

Mr. Olson: This witness is testifying as an expert.

Mr. Holman: If as an expert, it should be upon a hypothetical question.

The Court: I'll grant the motion to strike, in the form that the answer was made here.

Mr. Olson: Does that strike the entire answer?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: That certainly has no place in here.

The Court: The whole answer will be stricken.

Redirect Examination
(Continued)

By Mr. Olson:

Q. Well, Mr. Darcy, you show on this—let me ask you first, Mr. Darcy, what do these vertical lines in the different colors, what do they show?

A. They show what would have been the ultimate result of completion of this work, that is,

(Testimony of Patrick L. Darcy.)

from beginning to end of each operation as based on our estimate for that work.

Q. Now, I'm asking you if the holes had been excavated with a lateral clearance at the foundation of the structure of one foot out, and the banks from there to the surface to a one to one slope, and if the excavation had been made rapidly, and far enough ahead of you so that you [596] could have proceeded with your operations without being delayed by lack of excavations, and if you had been furnished with lumber on time and of a proper quality so that your operations would not have been delayed, could you then have completed your various forms of work as shown by these lines that are on the left hand portion of the identification 51——

Mr. Holman: Just a minute, Mr. Darcy.

Q. ——and going from the bottom portion of the exhibit to the top?

Mr. Holman: I submit, your honor, that counsel starts out asking this witness a question based upon assumptions he's using, and then he winds up tying it to this witness upon this exhibit. If he's asking this witness a hypothetical question, it has to be based upon assumptions, and if he's asking a factual question, it has to be based on this witness' testimony, or some testimony in the case.

The Court: This witness has testified as to what the difference would be in time consumed, as I recall, if the structures had been accord-

(Testimony of Patrick L. Darcy.)

ing to his conception of what the specifications said, and what they actually were. Now, he's putting it in the form of a graph. If you want to put it in the form of a graph to illustrate the testimony of this witness, I'll permit it to be [597] introduced.

Q. Is this a graph explaining or illustrating the testimony you have already given as to the time in which this job could have been, and as you testified, should have been completed, as against the actual progress of each type of work?

A. That's right.

The Court: The court will recess now for ten minutes.

(Short recess)

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, before proceeding, I have distributed to various counsel the amendment made to the answer and cross-complaint, as per stipulation, and with your Honor's permission I would like to have the amendment made in the original pleading by the Clerk. It would be substituting for pages 6 and 7 pages numbered 6a and 7a.

The Court: Is there any objection?

Mr. Hawkins: Is that in accordance with the stipulation?

Mr. Holman: The exact wording.

The Court: That amendment may be made.

(Testimony of Patrick L. Darcy.)

Mr. Holman: For pages 6 and 7, will you [598] substitute pages 6a and 7a?

Mr. Olson: If your Honor please, we offer in evidence plaintiff's identification 51.

Mr. Hawkins: We object to the introduction of this exhibit in evidence. Counsel stated that this graph purports to summarize the testimony of the witness. I submit that it does considerably more than that. It sets forth on each day the number of men that were working and the jobs that they were doing and the hours spent, and there has been no testimony of that kind whatsoever. This witness has testified generally that he was delayed, that the excavation work was not done properly, and that had it been done properly, according to his lights, it could have been done much faster. It is true that portion is set forth in this graph, but it is in detail, day by day, and also has this additional information along the foot of the graph. I submit it is not in any respect a summary of the witness' testimony. It purports to be evidence in and of itself of facts not testified to yet; and I also object on the ground that this exhibit is not the best evidence. It purports to be a summary or graph from the records, which has been prepared from the records of the Concrete Construction Company, and those records as yet are not in evidence, and those records, of course, would be the best evidence [599] as to what men worked on what job, and so on. For that reason we object.

Mr. Holman: I join, your Honor.

(Testimony of Patrick L. Darcy.)

Mr. Olson: Your Honor please, this does not show what men worked on what job. It does illustrate how many men were working in the yard, and how many men were working at concrete, and how many men were working at the structures, and on what days, and it is illustrative of this witness' testimony, showing that the job was carried away beyond the time within which it should have been completed. It seems to me that it is of assistance not only to the Court but to both sides of this case if they want anything about the man power that was on this job.

The Court: Well, the difficulty is that the manpower that was on the job on different days, at least throughout the whole operation, wouldn't be within the personal knowledge of this witness, even though he could testify to it directly if he had that knowledge. I assume what he's done here is to make this graph from the records of the Concrete Construction Company made up on the job, I suppose the payrolls and daily reports and whatever other data he may have used. It is my understanding that where records or documents are very voluminous or complex, and if they're available to both [600] parties, then a competent witness may go over them and make a summary or compilation of what they show, and that will be admissible in evidence, but he hasn't shown just what was used here as a basis for his computation of the man days on the job, and the number of men at those particular times, and it isn't shown that

(Testimony of Patrick L. Darcy.)

those records are available here. I think I'll have to sustain the objection at the present time.

Redirect Examination
(Continued)

By Mr. Olson:

Q. Mr. Darcy, with reference to that portion of this identification 51 which purports to show the number of man hours being spent on this job on a specific date, and doing specific work, from where or from what records, if any, did you get the information which you have graphically shown on identification 51?

A. The daily operation reports and the time cards from the work on the project.

Q. Is that information available from the payroll reports of the Concrete Construction Company, certified copies of which were sent in to the Bureau of Reclamation?

A. Not in that full a detail.

Q. Beg your pardon?

A. Not in that full a detail. On the certified transcript of payroll they're only registered as a carpenter, or a laborer, or a classification of whatever various type it [601] was.

Q. In other words, from the payroll you can't tell whether they were setting structures out in the field, or whether they were working out in the yard?

A. No; only from our payroll reports.

(Testimony of Patrick L. Darcy.)

The Court: Where are the records and documents from which your graph was prepared?

A. We have most of them right here with us.

Q. Well, is there any we don't have?

A. The time cards, truck reports, mechanic's reports, and all the rest of them are down there in one of those cases.

The Court: I didn't get the significance of the last answer as to where they were.

A. In one of those suit-cases down there.

The Court: I thought you were talking about a law-suit.

Mr. Olson: Could you just step down and get them, Mr. Darcy?

(Whereupon, Daily reports made by Superintendent on job were marked Plaintiff's Exhibit No. 52 for identification.)

Q. Mr. Darcy, handing you plaintiff's identification 52, I'll ask you what that is?

A. That is the daily manifest of the daily time, taken from [602] all time cards, mixer and truck reports on the job up there at 1062.

Q. And whose record is it?

A. These are turned in day by day by the superintendent in charge of the job, to the main office in Portland.

Q. Of what Company?

A. Concrete Construction Company.

Q. Made day by day, you say?

Mr. Holman: I move that that portion of the witness' testimony that pertains to anything before he was on the job be stricken.

(Testimony of Patrick L. Darcy.)

The Court: All right. Perhaps you had better take him off and put the plaintiff on.

(Whereupon, the witness Darcy was temporarily excused from the witness stand.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Olson:

Q. Handing you plaintiff's identification 52, will you state what that is?

A. That is as stated by Mr. Darcy, the daily reports sent in to the office each day by the superintendent on job 1062.

Q. And are those your original records, which you have just described? [603]

A. They are.

(Whereupon, time cards for August, 1944, to April, 1945, inclusive, were marked Plaintiff's Exhibits No. 53 and 53-a to 53-h for identification.)

Q. Handing you plaintiff's identification 53 and 53-a to 53-h inclusive, Mr. Schaefer, I'll ask you to state what they are?

A. They are the time cards that accompanied the daily report as sent in by the superintendent on job 1062, each day.

(Testimony of M. C. Schaefer.)

Q. And are they your official records for that purpose? A. They are.

The Court: Any cross-examination on those identifications?

Cross-Examination

By Mr. Holman:

Q. Do I understand that one of each is sent in each day?

A. Well, it may be that there is an accumulation of two days' reports. I didn't mean to make it that specific. It may be that they weren't mailed one day, and mailed the next.

Q. What I'm trying to find out, does 53 also go in to the Portland office, or does it stay on the job?

A. No, they come to the office.

The Court: Any further questions?

Cross-Examination

By Mr. Hawkins:

Q. Exhibit 52 for identification is made up from those time [604] cards, 53?

A. That's right.

Q. And they were made up under your supervision and control?

A. These cards were made up by the foreman on the job and the superintendent on the job. We entered the data from these cards into his daily report. He used them in making up that daily report.

(Testimony of M. C. Schaefer.)

Q. These time cards, then, are made up on the job, and the daily reports are also made up on the job? A. That's right.

Q. And then all of them are sent in to your office? A. That's right.

Q. From which you make up the payroll sheets?

A. That's right.

Q. And these are those records, and all of those records, pertaining to 1062, that you have?

A. Yes.

Mr. Hawkins: I have no objection.

Mr. Holman: I have no objection, except they're self-serving documents so far as the defendants are concerned, your Honor, and not admissible unless as illustrative of the witness' testimony.

The Court: Well, they haven't been offered yet, Mr. Holman. Any further questions of this witness?

(There being no further questions, the [605] witness was excused.)

PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, referring to plaintiff's identifications 51, 52, and 53, will you state from whence you got the information that you made up plaintiff's identification 51?

(Testimony of Patrick L. Darcy.)

A. From these forman's time cards.

Q. And that's identification 53?

A. 53; and have you got 52?

Q. This is 52.

A. And the entries in that determine the designations on 51.

Q. Was the information on 51 made up from any source other than those two identifications, 52 and 53, and 53-a to 53-h inclusive?

A. No, it all comes out of there.

Mr. Olson: Now, we re-offer in evidence, then, plaintiff's identification 51, and in connection therewith, plaintiff's identification 52 and plaintiff's identifications 53 and 53-a to 53-h inclusive.

The Court: I wonder if it would be necessary to offer in evidence all of these records, identifications 52 and 53?

Mr. Olson: Well, I'd rather not, your Honor.

The Court: Why don't you offer the other singly? The records from which it is compiled are here, available, and marked, and will be available during the trial to anybody who wants to use them. I'd suggest you not offer them at this time.

Mr. Olson: Well, I withdraw my offer of 52 and 53 with the sub-letters, and offer plaintiff's identification 51.

The Court: I assume the litigants don't want to have to copy any more than they have to. All right, what are the objections to the offer?

Mr. Hawkins: Your Honor, we still object that this is not the best evidence.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I join in that, your Honor, plus the fact that they're self-serving documents with no right possibly to check them during the progress of the trial. There just isn't time. This sort of a matter should be in the nature of one submitted and given some opportunity to check. It is just impossible within the time limits.

The Court: It will be admitted as a compilation made by the witness and as illustrative of his testimony, the compilation being from documents identified in evidence here.

(Whereupon, Plaintiff's Exhibit No. 51 for identification was admitted in evidence.) [607]

Mr. Holman: Your Honor, identifications 52 and 53 and sub-numbers are to remain available to the adverse parties for inspection?

The Court: Yes, that was the purpose of having them identified, so that they will be here. They are available if anybody wants to examine them, or offer any part of them.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, counsel had the she-bolt, which I believe is plaintiff's Exhibit 44, broken down into a sub-exhibit as 44-a, and asked you if that could be removed if you had a lateral clearance of 11½ inches.

Mr. Holman: I challenge that statement, your Honor. I didn't ask that.

(Testimony of Patrick L. Darcy.)

Mr. Olson: I think you did.

Mr. Holman: No; I asked him the length of the she-bolt.

The Court: As I understand it, the testimony as I recall was that the length of the she-bolt as testified to, that section of it as particularly marked, was 11½ inches.

Mr. Holman: Yes, sir.

The Court: And that the witness testified it could be removed with a clearance of 12 inches.

Mr. Olson: I just mis-understood that. [608]

The Court: I know that.

Mr. Holman: I understand that.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Then, Mr. Darcy, that would be clearance from what part of the form or panel, or clearance from what?

A. Clearance from the outside of the strong-back, which is the binding rail that holds the form in alignment.

Mr. Olson: That's all.

Recross-Examination

By Mr. Holman:

Q. But the portion of the she-bolt to be withdrawn would have been a part that went through the strong-back too, wouldn't it?

A. Would be what?

(Testimony of Patrick L. Darcy.)

Q. On your she-bolt, when it is through the structure, it goes through the strong-back too, doesn't it? A. Yes, certainly.

Q. So that the length of the half of the she-bolt which is indicated by Macri's Exhibit 44-A would pass through both the wall and the strong-back, correct? A. That's right.

Q. And it would have to have a total clearance of, you said 12 inches, did you not?

A. Well, clearance, yes, clear of the form.

Q. Now, can it be drawn back as far as the strong-back, and the strong-back knocked off? [609]

A. Yes, it can be.

Mr. Holman: That's all.

The Court: Any further questions?

Mr. Hawkins: No further questions.

The Court: Do you have any further questions?

Mr. Olson: No, your Honor.

The Court: May we excuse this witness at this time, then?

Mr. Olson: Yes.

(Whereupon, there being no further questions, the witness was excused.)

M. E. STICKNEY

called as a witness on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. M. E. Stickney.

(Testimony of M. E. Stickney.)

Q. Did you work on the job known as specifications 1062, out at the Roza Project?

A. I did.

Q. And by whom were you employed?

A. Mr. Macri.

Q. And in what capacity did you work for Mr. Macri? A. Superintendent.

Q. And for what period of time?

A. From August 14 'till December 9. [610]

Q. Of what year? A. Beg pardon?

Q. Of what year, Mr. Stickney? A. 1944.

Q. And as his superintendent, what part of the project did you have under your control in this division?

A. Pipe laying and excavation of pipe line, structures, fine grading.

Q. Mr. Stickney, did you have charge or supervision of the excavations for structures on behalf of Mr. Macri? A. I did.

Q. Now, did Mr. Macri give you any instructions with reference to the manner in which those excavations were to be made? A. Yes, sir.

Q. And what were those?

Mr. Holman: Just a minute; written or oral?

A. Oral.

Mr. Holman: When, and where?

A. In Mr. Macri's home in Seattle.

Mr. Holman: When?

A. Oh, I couldn't say exactly the date; previous to the time I went to work, a few days.

Mr. Holman: Previous to August 14?

(Testimony of M. E. Stickney.)

Mr. Olson: Now, if your Honor please, I think [611] counsel will have an opportunity to cross-examine.

Mr. Holman: I wanted to fix a date; I didn't want to interfere.

The Court: Well, perhaps you had better request permission to ask questions out of turn, and don't interrupt counsel's examination.

Mr. Holman: I'm sorry, your Honor.

Direct Examination

(Continued)

By Mr. Olson:

Q. What were those instructions, Mr. Stickney?

A. They were to be staked one foot outside of the concrete line all around, and dug vertical.

Q. And dug what? A. Vertical.

Q. Dug vertical; were the banks dug vertical?

A. Approximately so.

Q. Now, with reference to the fine grading, or the preparation of the floor of the excavation, and the sub-elevations did Mr. Macri give you any instructions with reference to that part of the work?

A. Not at that time, no.

Q. Did he subsequently, and while you were superintendent?

A. Yes, afterwards, when he was over on the job, we had some talk about that.

Q. What did he say?

(Testimony of M. E. Stickney.)

A. Well, he said that a few tenths one way or the other [612] didn't make any difference, that he was paying Mr. Schaefer extra for a little fine grading anyhow.

Q. He said what?

A. He said he was paying extra for a little fine grade anyhow, and that we wouldn't bother with it.

Q. Who did he say he was paying extra?

A. Mr. Schaefer.

Q. And he told you not to bother about it?

A. That's right; not small amounts.

Q. And pursuant to those instructions, then, was the fine grading as performed by Macri and Company not performed to the exact sub-grade as called for by the specifications?

A. The ones that had been fine graded before I came, some of them were not.

Q. Did you go back and check some of those, Mr. Stickney? A. I did.

Q. What did you find about the excavations that had been made previous to your coming on the job?

A. Well, they were in some cases off line, some cases twisted, and some cases high, and some cases low, and some of them were all right, as far as elevations were concerned.

Q. What was the situation with reference to the equipment which Mr. Macri furnished you as superintendent, to carry [613] on his operations?

A. It was very poor at that time.

Q. Can you amplify that a little bit, Mr. Stickney, say in what regard, what equipment you refer to?

(Testimony of M. E. Stickney.)

A. Well, I might do that by illustrating how the situation was when I taken over.

Q. Well, do that.

A. Well, I had a Loraine Hoe that was sitting out there, wasn't operating the traveling gear was out of it; I had a "4" Cat, Caterpillar Cat, bulldozer Cat, and it was operating when I got there, but that was the last day it operated. They couldn't operate it any more.

Q. For what reason?

A. Well, they had worn the hoist valves out, for one reason, in the hoist; they couldn't raise the blade, and the motor, lack of power in the main motor itself, it had no power to even pull itself.

Q. It wouldn't work mechanically, then?

A. That's right.

Q. What was the situation with reference to any of the other equipment?

A. Well, the truck that I taken over, when Mr. Ashley drove it in the yard the front frame was sitting on the front axle, one shackle of the spring was broken, two leaves in the spring was broken, and the motor, mechanically, was [614] in very poor shape; and I had one International truck, ton and a half, that was in very good shape, that is, considering, and one ton and a half Ford truck that would still run.

Q. Did you make any requests to Mr. Macri to furnish you with different and better equipment?

A. I did.

Q. And did he furnish it to you?

A. No, sir.

(Testimony of M. E. Stickney.)

Q. Now, when you checked these excavations when you got on the job, and found them wrong, did you have any conversation with Mr. Macri about it? A. I did.

Q. What did he say, and what did you say?

A. I suggested that we go back and re-fine grade, and he said no, that would cost too much money, that he had an engineer fine grade this, and a good one, and he knew they would be pretty close to right, and what little work there would be, he'd rather pay Mr. Schaefer than to put a crew back and fine grade ourselves.

Q. Those are the excavations to which you referred?

A. Had been already fine graded? Yes.

Q. So did you or did you not return and fine grade those?

A. I did return and fine grade some, but just the worst of them. [615]

Q. Now, did Mr. Macri furnish you with or permit you to hire sufficient crew to fine grade these excavations?

A. He didn't specifically object to hiring the crew, but I had no equipment to handle them.

Q. Did you have sufficient men in your employ to properly excavate and fine grade these excavations? A. I did not.

Q. Did Mr. Macri ever make any statements to you about his policy with reference to this job, of sub-contracting the work?

Mr. Holman: I object to that as calling for the witness' conclusion, your Honor.

(Testimony of M. E. Stickney.)

The Court: As I understand it, it is not calling for a conclusion; it is calling for what Mr. Macri said to him.

Mr. Holman: If he's referring to what he said—

The Court: Read the question, Mr. Taylor.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I had reference to the policy, if he's asking this witness to conclude what the policy was.

The Court: I'll overrule the objection. If he asks about particular things it may be objectionable as leading. I'll overrule it.

Witness: Yes, he did. [616]

Q. And what did he say?

A. Well, he said he'd like to sub-contract all the job he could; in fact, he'd like to sub-contract the pipe, if I could find someone to sub-contract the pipe laying to; he'd like to sub-contract that too.

Q. Did he say why?

A. Yes, the reason why, it throwed more responsibility out of his hands, and let the sub-contractors take the responsibility.

Q. Now, with reference to the lumber that was supplied on this job, did you have occasion as superintendent of Mr. Macri to examine the lumber that was furnished? A. I did.

Q. And would you describe that lumber as to its quality?

A. Well, some of it was fair, some of it was not so good, and some of it had been used before.

(Testimony of M. E. Stickney.)

Q. Now, was there—did Mr. Darcy or Mr. Macri's superintendent request additional lumber on this job?

A. Mr. Fisher's superintendent, you mean, or Schaefer's?

Q. Schaefer's superintendent.

A. Yes, he did.

Q. And did you relay those requests to Mr. Macri, to furnish lumber? A. I did.

Q. And just tell the Court what Mr. Macri would say to you, [617] or what developed with reference to furnishing lumber.

A. Well, usually when I'd call him up and give him the order he'd want to know what I wanted it for. When I told him it was for Mr. Schaefer he wanted to know what they had done with the lumber he sent before. I said it had been used in forms, and they were completely out, we should have some. He would say, ordinarily, well, it will be over Monday, or within a day or two, but usually he'd try and get it over Monday, but very seldom it ever came on Monday.

Q. What would happen when the lumber didn't show up; did you do anything about that?

A. Well, I'd call him again.

Q. What did he say?

A. Well, I can't say just what he did say, other than he just usually made an excuse that he hadn't been able to send it yet. He never refused to send it.

Q. State whether or not, Mr. Stickney, the form assembling crew, that is, the carpenters in the yard

(Testimony of M. E. Stickney.)

making the forms, were out of lumber, then, from time to time? A. Yes, they were.

Q. You said some of this lumber had been used. What was there about it that indicated that it had been used before?

A. Well, it showed nail holes, and some concrete stains; [618] some of it was split, like it had been a shed tore down, or something of that sort; some of it had been used in concrete forms somewhere.

Q. Now, did Mr. Macri ever interfere with your superintendency of this job?

A. In what way?

Q. Well, did he make any statements about the number of men you had on the job, or about your payroll?

A. Well, yes, he repeatedly said he thought I had too many men on the job.

Q. What did he say about it?

A. I don't know if he said any more than that much, only that we must cut down on the payroll as much as possible.

Q. Would there be times when men that you had hired didn't show up for work? A. Yes.

Q. Do you know whether or not they were discharged, or laid off?

A. I don't think they were discharged or laid off, none that I recall, under my jurisdiction.

Q. Now, Mr. Stickney, you said that you left this job when? A. December 9, I believe.

Q. Of what year? A. 1944.

Q. Now, were the excavations—were you able to complete the [619] excavations with the crew you

(Testimony of M. E. Stickney.)

had, and with the equipment you had, always ahead of the Concrete Construction Company?

A. No; no, I couldn't.

Q. And were they delayed and held up by reason of the excavations not being ready for their work?

A. They were once in a while, in the case of fine grading, yes, where a hole had been fine graded wrong and we'd have to go back.

Q. Were you discharged from this job, Mr. Stickney? A. No, sir.

Q. Did you quit? A. Yes, sir.

Q. And why did you quit?

A. Well, Mr. Macri developed the idea that I was working against him, instead of for him.

Mr. Holman: I move that be stricken, as a conclusion.

The Court: Yes, it will be stricken, as a conclusion.

A. And one reason——

The Court: I think he may show what Mr. Macri said.

Mr. Holman: No objection to that.

The Court: But I think this is rather a conclusion.

A. Well, he told me that in that many words.

The Court: Wait, just let the counsel ask you the questions.

Mr. Holman: I move that be stricken, as volunteered.

The Court: Yes. We have to proceed by question and answer, so that opposing counsel can object.

(Testimony of M. E. Stickney.)

Direct Examination
(Continued)

By Mr. Olson:

Q. What did Mr. Macri say, if anything, to you? What conversation did you have with Mr. Macri that led up to your quitting?

A. Well, the last time he was over there, about the last time he was there, he said "It looks like you're trying to work against me, instead of for me," as I understood him.

Mr. Holman: I move that that be stricken, your Honor—no, I'll not; he says as he understood him.

O. K.

Q. Did Mr. Macri ask you any time if you could take over the Concrete Structure work on this 1062 job? A. No.

Mr. Olson: That's all; you may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Stickney, when did you first prior—pardon me—when did you first after leaving the job talk with Mr. [621] Schaefer or any of his representatives? A. After leaving the job?

Q. Pardon me? A. After leaving the job?

Q. Yes, sir.

A. I believe it was last October.

Q. Last October; and where were you at that time? A. Lewiston, Idaho.

(Testimony of M. E. Stickney.)

Q. October, at Lewiston, Idaho; and who came to see you then?

A. Mr. Schaefer and Mr. Darcy.

Q. Which Mr. Schaefer?

A. M. C., I believe it was.

Q. And who else? A. Mr. Darcy.

Q. At your—you have a farm over there, do you, or a home? A. That's right.

Q. Now, at that time, or at any time after you left the job, did you advise Mr. Macri that they had talked to you? A. How's that?

Q. At that time, or any time afterwards, did you advise Mr. Macri that they had talked with you?

A. No, I hadn't saw him.

Q. And did you at any time or at any time subsequent give [622] them a written statement?

A. I did at that time.

Mr. Holman: May I call for the production of that statement, counsel?

The Court: I assume it will take some little time to cross-examine this witness?

Mr. Holman: I think it will.

Mr. Olson: I'm not willing to give them this statement unless your Honor directs me to. If they want to put this statement in evidence I've got no objection to it going into evidence, but it is my position they're not entitled to it to harass the witness. If they want to put it in evidence I'll consent right now to put it in evidence.

The Court: Well, we can take that up in the morning. The court has some other matters to take

(Testimony of M. E. Stickney.)

up, as usual, and I think it would be easier to let you just go out, and recess for five minutes, and then I'll come back and take up those matters.

Mr. Holman: May I ask your Honor if the Court holds sessions on Saturday?

The Court: No, I plan to adjourn tomorrow night until the following Monday morning.

Mr. Holman: On this case, your Honor?

The Court: On this case, yes. [623]

(Whereupon, the Court took an adjournment in this case until Friday, February 28, 1947, at 10 o'clock a.m.)

Yakima, Washington, February 28, 1947,
10 o'Clock A. M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: At the last of yesterday's session I asked for production of the statement signed by Mr. Stickney, Mr. Olson.

Mr. Olson: It's our position, your Honor, as I indicated last evening, that we should not be directed to produce the statement. Any document that's given by this witness to us is given for our information in questioning him. Counsel's only purpose in having it could be, as I indicated yesterday, to harass this witness on cross-examination, and as I further said yesterday, if counsel wishes to put the statement in evidence, then I have no

(Testimony of M. E. Stickney.)

objection to it going into evidence, but I don't believe that counsel has the right to demand a document out of my files not for the purpose of putting it in evidence, but solely for his use in cross-examining the witness.

The Court: Well, I think that either side has a right to demand of another any document that is pertinent and material to the case, if it isn't privileged, and [624] there is no contention that this is privileged as a communication between attorney and client, or anything of that sort?

Mr. Olson: No, your Honor.

The Court: I think they have a right to demand it for use; if he's made a former statement and there is anything inconsistent with what he testified, they have a right to use that, and if counsel does not put it in, then I think you would have that privilege if you wish to do so.

Mr. Olson: Your Honor directs me to deliver the statement to Mr. Holman?

The Court: Yes.

(Whereupon, Mr. Olson delivered the statement to Mr. Holman.)

The Court: I think he should return it when the cross-examination is concluded if he doesn't put it in evidence, however.

Mr. Holman: May I have a minute to read this, your Honor?

The Court: Yes, all right.

(Testimony of M. E. Stickney.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. Mr. Stickney, I believe you told me that Mr. Schaefer and Mr. Darcy came to your home in Lewiston, Idaho, on or about the 24th of August?

A. That's right.

Mr. Olson: What month?

Q. 24th of August—pardon me, October.

A. October.

Q. 1946. I'll ask you whether or not at that time they made any representation to you as to whether or not there was an arbitration pending?

Mr. Olson: That's objected to as being immaterial, if your Honor please, any discussion about arbitration. I didn't go into arbitration.

The Court: Well, I presume it is leading to something else. Overrule the objection.

A. I believe they said they had a hearing on this trial.

Mr. Olson: Had what?

A. Had some sort of a hearing on this case.

Q. They said they had had some sort of a hearing on this trial?

A. On this case, as I remember it.

Q. Did they tell you where it was they had a hearing? A. No.

Q. Tell you before whom they had a hearing?

A. No.

(Testimony of M. E. Stickney.)

Q. Tell you when they had a hearing?

A. No.

Q. And did they tell you then that if you gave a statement [626] it would help in the matter of the adjustment and settlement of the case?

A. That was the understanding.

Mr. Olson: Now, if your Honor please, this is not cross-examination of this witness, if the statement has not been offered into evidence. What I asked Mr. Stickney——

Mr. Holman: Here's your statement.

Mr. Olson: Yes, I gave it to you. If he wants to put that statement into evidence that's something else, but he's now gone into an entirely collateral matter.

The Court: I suppose he's leading to interest or bias. On that ground I'll overrule the objection.

Q. Did they tell you at that time that you would be required to attend at that hearing they were talking about?

A. They didn't say that I would be required. They asked me if I would attend.

Q. Didn't they tell you this, that if you wouldn't attend you would be subpoenaed and forced to come? A. They did not.

Q. And did they make any arrangement for your compensation for coming?

A. They said they would reimburse me for my expenses, yes. [627]

Q. And at that time did they tell you when there would be any hearing? A. No.

(Testimony of M. E. Stickney.)

Q. Now, they furnished you a photostat of this statement you furnished them, didn't they?

A. They did.

Q. Who prepared the context of this statement that they furnished you a photostat of?

A. I prepared it.

Q. As you would talk it over with them?

A. Very little.

Q. Mr. Darcy was there, wasn't he?

A. Yes.

Q. Did he have anything to say?

A. Well, not a great deal.

Q. And Mr. Schaefer had nothing to say?

A. Some, yes; we talked.

Q. Now, isn't it a fact they talked the whole thing over with you and then the statement was written after the talk was over?

A. They did not, because I was working.

Q. Then you sent them the statement later?

A. No.

Q. What do you mean by that, sir?

A. They came out on the job where I was working, and wanted [628] to know if I would give them a statement. I said I was working and I couldn't spare the time right then; if they minded to wait until lunch hour I would give them a statement then, which they did. They sat in a car out on the job and I worked until noon. They went to my house for lunch and I dictated the statement to my wife and she wrote it, so I could get back on the job.

Q. This is your wife's handwriting?

A. That's right.

(Testimony of M. E. Stickney.)

Q. Now, during the course of the writing of this statement, isn't it a fact that from time to time your wife would discuss with you as to whether or not you should make that statement or the other one?

A. Other one?

Q. One statement or another? A. No, sir.

Q. She had nothing to do with the discussion as to what went into the statement? A. No, sir.

Q. They furnished you with a photostat copy?

A. That's right.

Q. They told you to keep that to remember what your testimony would be?

A. No, they didn't tell me to keep it.

Q. You didn't ask for it, did you? [629]

A. No, sir.

Q. They had that plan set up to take that photostatic copy and send you a copy?

Mr. Olson: I object.

The Court: I'll sustain the objection. He didn't know their plan.

Q. And was the photostat mailed to you?

A. That's right.

Q. You don't have that with you?

A. I do not.

Q. Here's your statement, counsel. Now, did you at any time after that, after securing the statement, notify Mr. Macri that you had given such a statement? A. I did not.

Q. I think you said that yesterday. You went to Mr. Macri's office in Seattle, did you not, shortly ahead of the time that you became employed? I

(Testimony of M. E. Stickney.)

think you said you started the employment on August 14th. A. I went to his house.

Q. You didn't go to his office?

A. I might have went once to the office before I came over.

Q. I'm referring to 905 10th Avenue South, where the office is, down there by the bridge.

A. I'm not positive I was down there before I came over or not. [630]

Q. Isn't it a fact, Mr. Stickney, that you came to Macri's office, you told him you had a daughter in Seattle, you were at the time living with the daughter in Seattle, and that you had come down for the purpose of seeing if you could get work on Macri's job?

Mr. Olson: Objected to as not proper cross-examination.

The Court: When was this supposed to be?

Mr. Holman: Just ahead of taking the employment.

The Court: That's going pretty far back, isn't it? What's the purpose of it?

Mr. Holman: The purpose is to show the interest of this witness.

The Court: Well, to show his interest that he wanted a job? I don't get how it would show his interest, the mere fact that he wanted employment.

Mr. Holman: I mean as a matter of solicitation of the employment.

The Court: Well, I'll overrule it, then.

A. Not at the office.

(Testimony of M. E. Stickney.)

Q. Well, that was what you said, was it not?

A. No.

Q. I'll ask you if you didn't at that time tell Mr. Macri that you had been working for another contractor over here in the Roza Project—you had been working for [631] H. H. Walker, Inc.?

A. That's right.

Mr. Olson: If the Court please, that certainly doesn't show——

The Court: Wait until he finishes the question.

Q. And that your salary with Walker as superintendent had been \$90.00 per month?

A. I believe that's right.

Q. Per week, I should say; and that you would want that same compensation?

A. That's right.

Q. Yes. And I'll ask you if Mr. Macri didn't say that that would be all right?

A. That's right.

Q. And is it a fact that you were employed then to take over the work as superintendent, at \$90.00 per week?

A. That's right.

Q. Yes.

(Whereupon, computation of compensation of M. E. Stickney during period of employment with Macri & Company was marked Defendant Macri's Identification 54.)

Q. Handing you what is marked Macri's 54 for identification, Mr. Stickney, which purports to be a copy of your compensation during the period that you have testified you [632] were on the job, and

(Testimony of M. E. Stickney.)

handing you the Macri payroll beginning with the week of August 16th, that would be the week that you started, would it not? A. That's right.

Q. Their week began with a Tuesday and ended with a Monday? A. That's right.

Q. Now, is that particular payroll in your hand?

A. No.

Q. All right, now turn on from there. You're on that particular payroll? A. Yes.

Q. M. E. Stickney is shown for Monday, Tuesday, Wednesday, at eight hours a day, and weekly \$50.00? A. Yes.

Q. Now, would you trace through, with due regard to this, Mr. Stickney, maybe you can tell without tracing through, whether or not that is a true representation of your total compensation?

A. Yes.

Q. It is? A. Yes.

Mr. Holman: All right, I offer it in vidence, your Honor, as further indiction of the witness' interest.

Mr. Olson: Now, if the Court please, with all due [633] respect to counsel, I submit that's not the purpose for which this document is offered, to show that they had been paying Mr. Stickney some sum of money. Obviously they were paying him. I've shown that he was their superintendent. Now, when I put Mr. Stickney on the stand I asked him about condition of equipment and excavations and conversations with Mr. Macri about the job. Now, how is it proper cross-examination, or how does it prove

(Testimony of M. E. Stickney.)

that he's interested in our side, to show that he was on their payroll and receiving a certain compensation? I submit that the purpose of that exhibit is not to show Mr. Stickney is interested on behalf of the plaintiff. We object to its introduction.

Mr. Holman: I don't say he's interested on behalf of the plaintiff. I'm showing his true situation.

The Court: Is there any question of his being the superintendent during the time he testified?

Mr. Holman: No, nor is there any question about his compensation as shown on the payroll.

The Court: How does his compensation bear upon his interest? How is it proper cross-examination?

Mr. Holman: What I want to show, your Honor, is that this witness had the control of fixing even his own compensation, because this payroll shows that he went over there at \$90.00 a month, and he fixed his compensation [634] at \$100.00——

The Court: I thought the testimony was he went over at \$90.00 a week?

Mr. Holman: A week, and this shows \$100.00 a week.

The Court: How does that show he had the power of fixing his compensation? That might have been by subsequent agreement or arrangement.

Mr. Holman: He said he made up the payrolls, your Honor.

The Court: Does that mean he fixes his own compensation?

Mr. Holman: Yes, sir.

(Testimony of M. E. Stickney.)

The Court: No, I think not. I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you arrived there, did you not, ahead of or on the 14th of August?

A. That's when I taken over, I believe.

Q. Yes; and when you arrived, Mr. Verne E. Ashley, an engineer, had been on the job and was on the job?

A. That's right.

Q. And he remained on the job, did he not, for two or three days afterwards, to orient you to the job?

A. That's right. [635]

Q. It is also a fact, is it not, that on the first day that you were on the job, August 14th, Mr. Macri, as prearranged with you, came over on to the job on that Monday that you started work?

A. He came over with me; whether it was on Monday or the day before I don't know.

Q. You say he came over with you?

A. Well, he came over that day; I don't remember whether he come with me or not.

Q. You took your trailer, didn't you?

A. I think so.

Q. But Mr. Macri met you on the job?

A. That's right.

Q. And you and Mr. Ashley had been out on the job, and then you came back to the office, and there's where you met Mr. Macri?

A. I believe that's right.

(Testimony of M. E. Stickney.)

Q. Now, hadn't Mr. Macri told you to go over and take up matters with Mr. Verne Ashely with the idea of substituting for Mr. Ashley, because he wanted to come back to Seattle?

A. I believe so.

Q. That his home was in Seattle and that he wanted to come back. Will you tell me, please, when and where, and in whose present, Sam Macri told you this? Counsel asked [636] you "What were those instructions, Mr. Stickney?" Answer, "They were to be staked one foot outside of the concrete line all around, and dug vertical". You're speaking of excavations. I want to know when and where and in whose presence that statement was made.

A. That was in Mr. Macri's house in Seattle, and I believe Wayne Gentry was there, and my daughter.

Q. Who is Wayne Gentry?

A. My daughter's husband.

Q. All right; now, will you take the calendar for 1944, and with reference to Monday, August 14th, can you see that, Monday, August 14th?

A. Yes.

Q. First, the approximate time that that meeting was, in the Macri home?

A. Well, I wouldn't say for sure; I think probably around the 10th or 11th, somewhere near there.

Q. Just a minute; you think it was around Thursday or Friday preceding the time you came over?

A. I think so.

(Testimony of M. E. Stickney.)

Q. And what was the time of day?

A. In the afternoon and evening.

Q. In the afternoon and evening. Were any of Mr. Macri's family there? A. No. [637]

Q. Now, will you tell me what Mr. Macri's statement was exactly, to the best of your ability?

A. No, not very much of it.

Q. Well, what was his statement to the best of your recollection?

A. Well, I don't recall that Mr. Macri made any particular statement, only just the course of conversation about the job, as to how it was being run, and what the general practice was on that job.

Q. Counsel asked you "What were those instructions?" Now, did Macri give you instructions that day? A. That's right, he did.

Q. What were they?

A. Staking one foot outside of neat concrete line; and I asked him at that time "Are you digging on a slope, or vertical?" and he said the holes were just dug vertical.

Q. Why did you ask him?

A. Because I knew the specifications.

Q. You had been on the job, hadn't you?

A. On that job? No, sir.

Q. You had not?

A. Oh, I had been down there, but not to look the job over, no.

Q. You had looked the job over?

A. I did not. [638]

(Testimony of M. E. Stickney.)

Q. You had seen operations in the field generally, hadn't you? A. Not on their job.

Q. Well, I say generally in the field?

A. Not on that job.

Q. Had you seen it generally in the Roza Project?

Mr. Olson: That's objected to as being immaterial.

The Court: I'll overrule the objection.

Q. You had done the job for Walker right there, hadn't you? A. That's right.

Q. And that was an adjoining job, wasn't it?

A. Not an adjoining job, no.

Q. Well, it was in the same vicinity, wasn't it?

A. That's right.

Q. And you knew how excavations were made generally? A. I knew how I made them.

Q. And you told Mr. Macri how you made them?

A. That's right.

Q. And he told you to do the same thing, didn't he? A. That's right.

Q. Now, with reference to the fine grading, or the preparation of the floor for excavation—pardon me—with reference to the fine grading, or the preparation of the floor of the excavation for receipt of the form, you say [639] that Macri did or did not give you instructions at that time with respect to that? I'm talking about this time in the house.

A. I think that was brought up; that was one part of the job I was to take care of.

(Testimony of M. E. Stickney.)

Q. And did he give you instructions at the house at that time with respect to that?

A. I think so.

Q. All right. Now, yesterday, when counsel asked you, and I'm reading from the reporter's record "Now, with reference to the fine grading, or the preparation of the floor of the excavation, and the sub-elevations, did Mr. Macri give you any instructions with reference to that part of the work?" Answer, "Not at that time, no"; question, "Did he subsequently, and while you were superintendent?" answer "Yes, afterwards when he was over on the job we had some talk about that."

A. Well, probably.

Q. Well, now, which is it, Mr. Stickney; at the house there, when he was giving you instructions, or was it on the job? A. Well, I think both.

Q. Then when you told counsel he didn't give it at that time you were in error?

A. I imagine I was, if I said that, and I guess I did.

Q. Didn't Mr. Macri tell you, in substance, this, when the [640] matter of fine grading was discussed, and the details of fine grading on the job, that Schaefer and Macri had talked about the fine grade, and Schaefer had told Macri that he would rather have it high, a little, and take off some, than to use more concrete if it were below grade?

A. I never heard any such conversation.

(Testimony of M. E. Stickney.)

Q. You never heard any such conversation, sir? What was the conversation Macri had with you with respect to Schaefer?

A. It was very little.

Q. I thought you detailed quite a lot here yesterday? A. Beg pardon?

Q. Yesterday you told, did you not, what it was?

Mr. Olson: I don't think that's a proper question, your Honor. If he wants to direct the witness to certain questions and answers I have no objection to it, but I don't recall him testifying about Mr. Schaefer.

Q. Macri's conversation with you about Mr. Schaefer. A. I didn't get the question.

Q. I want you to detail Macri's conversation with you about Mr. Schaefer and the fine grading.

Mr. Olson: Now, your Honor, that question is a double question. I don't know what——

Q. Well, pertaining to the fine grading.

The Court: Well, you had better ask the question over again. I think it is a double question. [641]

Q. I want you to detail any conversation you had with Mr. Macri about the fine grading as pertaining to Schaefer's job; let's say as pertaining to this 1062.

A. Well, I can't recall any definite conversation.

Q. You can't? A. No, not in detail.

Q. Were the units as bid by Schaefer or his sub-contract, or his sub-contract bid, at all discussed between Macri and you?

(Testimony of M. E. Stickney.)

Mr. Olson: That's not proper cross-examination, if the Court please. I didn't go into any conversation between Mr. Macri and Stickney relating to Schaefer's bid.

The Court: I think it is generally pertinent. I'll overrule the objection.

A. Yes, it was.

Q. What did you do, read the sub-contract?

A. I never did.

Q. Well, what was said about it?

A. Well, he just told me what was in it.

Q. You didn't see it, then, at all?

A. I never saw it.

Q. Now, when you got over on the job on August 14, 1944, did you meet Mr. Verne E. Ashley for the first time, or had you known him before?

A. I believe I met him about a week before that.

Q. In fact, you were fellow superintendents on the Roza Project, weren't you?

A. That's right, but I never saw him while I was working.

Q. Oh; well, where did you meet him the week before?

A. I think just beyond Macri's office, in the road.

Q. And then had you arranged at that time with Mr. Ashley that you would go to Seattle for the purpose of being employed to replace him?

A. I had no intentions.

Q. Well, when you came and had been out on the job on August 14, 1944, before you and Mr. Ashley met Mr. Macri, what had you done with respect to inspection of the job?

A. Nothing.

(Testimony of M. E. Stickney.)

Q. Had you gone over any of the work that was fine graded? A. Before that, you mean?

Q. No, that day, that morning?

A. Oh, that day; no.

Q. Had you talked with Ashley about fine grading? A. I had.

Q. And had you looked at any of the fine grading at all? A. Oh, I drove by them, yes.

Q. No, I mean that day.

A. That day, yes, we drove by some.

Q. In other words, you were in a car, you and Ashley? A. That's right, in my car. [643]

Q. Were the structures in at that time, Mr. Stickney? A. They were, a few.

Q. How many, about?

A. Oh, I couldn't say.

Q. Why can't you say? Can't you approximate, sir?

A. Oh, approximately thirty, maybe, I'd say.

Q. Thirty structures in on the whole job?

A. I think so, something like that.

Q. In August?

A. I couldn't say how many was in.

Q. Now, may I understand, please, we're talking first about lateral 59.3. You say there were only thirty structures?

A. I said I didn't know; I said somewheres around there.

Q. All right; those you saw, did they give evidence of having been newly placed, or having been there a long while?

A. You mean the forms, or the structures?

Q. The forms.

(Testimony of M. E. Stickney.)

A. Well, the forms that I saw setting hadn't been setting too long, I don't believe.

Q. Did you see any forms that had been there for a long while? A. No.

Q. That were weather cracked? A. No.

Q. You didn't? And when you say about thirty structures, [644] you mean there had been about thirty poured by them? A. I think so.

Q. Well, how many forms were up, besides—empty ones? A. I don't know.

Q. Well, would you say ten, twenty, a hundred, a hundred and fifty, or what?

A. I still don't know.

Q. Can't you give me any idea?

A. No idea.

Q. Now, at that time, that day, did you see the job yard? A. Yes, sir.

Q. And were there form panels constructed in the yard? A. There were some.

Q. Well, what do you mean by some, sir?

A. Oh, a few; not many.

Q. Well, enough to fill how many holes, about?

A. Well, I wouldn't know.

Q. Sir?

A. I wouldn't know how many structures it would make.

Q. And were all the forms that were on the job filled with concrete? A. No.

Q. And you can't estimate how many were in?

A. No.

(Testimony of M. E. Stickney.)

Q. Where was the shovel excavation on that day that you went [645] there?

A. I don't know, to the exact number.

Q. But there was shovel excavation going on?

A. No, sir.

Q. There was none going on that day?

A. No, sir.

Q. Did you talk with Mr. Ashley about that?

A. I did.

Q. And what did he say?

Mr. Olson: If your Honor please, I just think counsel is going pretty far in his cross-examination. Now this particular thing, asking for conversations between two of Mr. Macri's foremen, certainly I didn't go into where the hoe was, and what was the matter with the hoe.

Mr. Holman: I'm not asking about the hole; I'm asking about shovel operations.

The Court: You're asking about conversation.

Mr. Holman: I'll withdraw. I was trying to get the orientation of this witness to that job that day with the other superintendent before he left.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Was there fine grading going on that day?

A. No, sir.

Q. Was there any called for that day, while you were there? [646]

A. No.

(Testimony of M. E. Stickney.)

Q. Was there any pouring going on that day?

A. I believe they did pour that day; I'm not positive.

Q. Did you watch the operation?

A. I don't believe the first day I did.

Q. Did you, while Mr. Ashley was still there, watch that operation? A. Yes, sir.

Q. Did you watch an operation of fine grading while Mr. Ashley was there?

A. There was none.

Q. Then you didn't watch any?

A. No, sir.

Q. Did you watch any shovel excavation while Mr. Ashley was there? A. No, sir.

Q. Or hoe operation? A. No, sir.

Q. Or Cat operation? A. No, sir.

Q. Now, the Cat operation, when we refer to Cat we mean Caterpillar Tractor, that's correct, isn't it?

A. That's right.

Q. It's commonly called in the field Cat?

A. That's right. [647]

Q. Now, the Cat operations, were there any Cat operations going on?

A. The day I got there it was working a little.

Q. What were they doing?

A. Back-filling pipe line.

Q. By that you mean bringing the earth back to the complete concrete structure?

A. No—pipe line.

Q. Oh; then the Cat was working on the pipe line? A. That's right.

(Testimony of M. E. Stickney.)

Q. And was the shovel set to work on the pipe line at that time? A. No, sir.

Q. Where was the shovel set?

A. It was setting out in a plowed field about two miles from where the Cat was.

Q. That was the Laraine, was it, then?

A. That's right.

Q. What is the fact with respect to whether or not there was a rented Bay City shovel operating at that time?

A. No, sir; it was there, but not operating.

Q. Now, how long do you say it was that there were no machine or Cat operation?

A. Well, I couldn't say for sure.

Q. I mean hoe or Cat operations? [648]

A. I couldn't say for sure. I think, come to think of it, I will change that statement about the Bay City. I believe it did finish the lateral it was on sometime while I was there; I'm not sure about that.

Q. Now, isn't it a fact, and didn't you learn when you were on the job on the 14th, that the Bay City had been working continuously up to August 11th? A. I believe it had.

Q. Yes, sir.

Mr. Olson: Now, if your Honor please, I'm going to move that be stricken. Obviously it would have been based on conversation related to him, as to what the shovel had been doing up to August 11th, before he got there.

(Testimony of M. E. Stickney.)

Mr. Holman: This is to meet the witness' statement on direct that there was no equipment, adequate equipment—broken down equipment.

Mr. Olson: I was asking while he was there.

The Court: Obviously anything that happened while he was there would be a matter within his knowledge.

Mr. Holman: Except for his information with respect to the job.

The Court: Well, he wouldn't know whether the machinery was operating before he got there or not, except by hearsay. [649]

Q. Had you seen it operate?

The Court: Before he got there, you mean, Mr. Holman?

Mr. Holman: Well, he had been there, your Honor, on the other job.

A. Oh, no; nowheres near there on the other job.

Q. Could you tell me, please, with respect to the Maceri payrolls now, I'll ask you a few questions about the men, if on October 21 you didn't start using Mr. Spencer Tully's Cat? Will you look at the payroll to see if you had a Cat operator there?

A. Well, I'm sure that that's right. I wouldn't say that was the date, but I did use the Cat.

Q. Yes, sir, but it was used on the job there, the Cat and the 'dozer? A. That's right.

Q. Is that the one you said was worn out and the motor was gone and no treads?

A. No, sir.

Q. In other words, there was another one put on?

(Testimony of M. E. Stickney.)

A. There was another one put on, yes, sir; that was Mr. Tully's.

Q. All right; would you look at the payroll and satisfy yourself whether or not on August 17th, three days after you got there, the Laraine Hoe was not being [650] operated?

A. Was not being operated?

Q. Was being operated?

A. I don't believe it was.

Q. Will you take a look and see if on August 17th it was not operating? These records you're referring to, Mr. Stickney, are your own handwriting, are they not? A. Yes.

Mr. Olson: May I inquire, your Honor, if the payroll shows whether or not the machine was operating, or whether it merely shows the operator on the payroll?

Mr. Holman: I'm asking the witness to refresh his memory off the payroll, and the witness can do it where you or I could not, counsel.

Mr. Olson: I want to make sure the witness understands whether or not you're asking whether there was a shovel operator on the payroll, or whether it was operating.

The Court: I thing the question was whether the shovel was operating.

Mr. Olson: I don't know whether the witness understands or not.

Mr. Holman: If he doesn't he can say so.

A. No, it wasn't operating.

Q. You did have a shovel operator on the payroll that day, [651] didn't you? A. That's right.

Q. What did he do?

(Testimony of M. E. Stickney.)

A. Overhauling the shovel.

Q. Now, isn't it a fact, Mr. Stickney, that that shovel was back on the job with over three thousand dollars expenditure on it, and operating, after August 17th?

A. That's right; I wouldn't know how much the expenditure was.

Q. But within three days after the time you got there it was operating? A. No.

Q. How many days?

A. I wouldn't say, but it was more than that.

Q. George Siegel is the man I'm talking about.

A. That's right.

Q. He's the operator, is he not?

A. That's right.

Q. Now, between the time you got on the job and October 21, 1944, the operations were all digging, weren't they, shovel excavation?

A. There was one Hoe probably working by that time; I don't remember.

Q. By October?

A. Yes; oh, by October, yes, there was one Hoe operating. [652]

Q. But the general operations were excavation?

A. That's right.

Q. For structures. Now, about nine days after you got on the job, you employed a Mr. Wyckoff as engineer, did you not? Will you consult your payroll and see if he didn't go on about August 23? Can you find August 23?

A. I haven't yet, no.

(Testimony of M. E. Stickney.)

Q. I had turned down the page there that you started on.

The Court: You'll have to speak up, Mr. Holman; you're starting to mutter.

Q. I had turned the page down that you started with before; I thought it might help you work from there forward, Mr. Stickney.

A. What was that date?

The Court: 17th of August.

Q. August 23, didn't he go on the payroll?

The Court: 23rd, was it?

Q. 23rd of August, yes. A. Yes.

Q. Now you hired Mr. Wyckoff yourself?

A. I presume I did.

Q. Well, isn't it a fact you did?

A. I don't know.

Q. You can't remember? A. No. [653]

Q. You hired him as an engineer, did you not?

A. I don't know.

Q. What does it show there?

A. It shows as an engineer.

Q. Yes, sir. Now, then, Mr. Wyckoff as an engineer worked then continuously through, did he not, until December 11, 1944, as an engineer? Just check through there, will you, on his name?

A. I presume he did.

Q. Well, doesn't it show there, Mr. Stickney, in your handwriting?

A. Well, it shows as far as I see, yes. I don't dispute it.

(Testimony of M. E. Stickney.)

Q. Yes, sir. Now then, additionally, on December—pardon me, on November 18th, you employed Mr. King, did you not? A. I did not.

Q. Well, on December 11th Mr. King came on to the job, did he not, as engineer?

A. I wouldn't know what time.

Q. Would you consult again, there, sir? That's still your payroll. A. On what date?

Q. December—pardon me—November 18th, Mr. Stickney; Mr. Wyckoff having left on the 11th, Mr. King came on as an engineer on the 18th of November, correct?

A. Mr. King on the 18th of November? [654]

Q. Yes, sir. A. Oh, yes—yes.

Q. Right? A. That's right.

Q. Then two days later you employed and put on Mr. Black, did you not? A. That's right.

Q. And what was Mr. Black's capacity?

A. Engineer.

Q. On November 20th? A. That's right.

Q. Then both King as engineer and Black as engineer stayed on until you left on December 9th, is that right? A. That's right.

Q. 1944. Now, is it or is it not a fact that your employment of men while you were superintendent there was left in your hands, to get men as required, and of the class of men you wanted, and the pay, you fixed the pay? A. That's right.

Q. Yes, sir. And is it not a fact that you got men wherever you could in the labor market, scarce as it was? A. That's right.

(Testimony of M. E. Stickney.)

Q. It was a scarce labor market, was it not?

A. That's right.

Q. Yes; and you were the sole one to select and the sole one [655] to determine number of men and the sole one to determine how long they should stay or whether they should stay? A. That's right.

Q. Yes, sir, and I believe you said on direct examination that Mr. Macri didn't interfere with that? A. I don't believe he ever did.

Q. Yes, sir.

A. Oh, yes, one time when I first wanted to hire Mr. Black he objected, and I finally hired Mr. Black without permission.

Q. Well, anyway, you hired him, didn't you?

A. That's right.

Q. And from that time on there was no objection to the number of men you had?

A. No, sir, not specifically.

Q. Sir? A. Not specifically.

Q. Well, all right; so that insofar as the fine grading was concerned you could get the men you wanted, could you not?

A. I could get the men, yes.

Q. How many comprised a workable crew of fine graders under Mr. Black?

A. Oh, different numbers; one day maybe one, next day maybe two, maybe three; I sometimes had to pull them to do [656] other work.

Q. What I want to know is what is a normal crew, three or four men?

A. About four men, yes.

(Testimony of M. E. Stickney.)

Q. And when we speak of Mr. Black, that's James A. Black, the gentleman here in the courtroom? A. That's right.

Q. Now, the equipment for a fine grading crew, Mr. Stickney, is a shovel or a spade and a mattock, isn't it, primarily? A. A pick, usually.

Q. A pick or mattock and a shovel?

A. That's right.

Q. Not any of the mechanical equipment at all?

A. Got to have a truck to get them around.

Q. Well, that's for transportation, is it not?

A. That's right.

Q. But I'm talking about the equipment.

A. That's right.

Q. It's hand grading? A. That's right.

Q. It's what I think is generally known as "manicuring"?

A. Well, I haven't heard it. It could be.

Q. You haven't heard of "manicuring" banks?

A. It could be.

Q. In other words, it is to dress down to a fine basis what [657] had been previously excavated in the rough? A. That's right.

Q. When did you start Mr. Black on fine grading?

A. Well, he worked there part of the time.

Q. I think we said that was November 20th?

A. November 20th, I believe it shows here.

Q. Now, did you or did Mr. Black determine that Mr. Ashley's work in fine grading was in error?

A. Both of us.

(Testimony of M. E. Stickney.)

Q. Both of you did. How was that done?

A. By going back and checking.

Q. And then you say you told Mr. Macri?

A. I did.

Q. That it was out of line, off the line, was it?

A. Yes, sir.

Q. In other words, he had a line set, but it was off of the line, right?

A. There was no line set.

Q. Well, what do you mean by out of line?

A. Out of line of the natural run of the ditch.

Q. In other words, the structure had been excavated and the fine grading had been done so that if it had been used and a concrete structure was put in it, it would have zig-zagged out and come back in?

A. That's right. [658]

Q. How far? A. Oh, they varied.

Q. Well, what is the maximum?

A. I run into some as much as two feet.

Q. Two feet over out of the way?

A. That's right.

Q. What did you do to make another hole?

A. Dug the other side out so they could set the structure back on line.

Q. What station was that?

A. I wouldn't know.

Q. Approximately what station was that?

A. I don't know.

Q. What lateral was it? A. I don't know.

Q. You can't even tell me the lateral?

A. Not off hand.

(Testimony of M. E. Stickney.)

Q. Is there any way you can inform yourself?

A. No.

Q. Can you tell me whether it was one of the small numbered structures or one of the last numbered structures?

A. It was about the center of the job, somewhere; probably 200, 250, somewhere along in there.

Q. Now, isn't it a fact, Mr. Stickney, that you had as the work of Mr. Black, sir, digging by hand a hole or two so [659] that the shovel would not have to come back?

A. That's right, probably; I don't recall. I know we dug some, but whether it was the first operation I don't know.

Q. And didn't you determine it was better to dig by hand those small structure holes than to call the shovel back?

A. That's right; the shovel was miles ahead.

Q. And that was your direction?

A. That's right.

Q. Now, were they dug right?

A. Far as I know.

Q. Were they fine graded right?

A. Far as I know.

Mr. Olson: Now, I object to counsel asking if they were dug "right". He should ask the witness, it seems to me, to describe the manner in which they were dug. There seems to be a dispute here as to what is the right kind of a hole.

(Testimony of M. E. Stickney.)

The Court: Well, I'll overrule the objection. It's his idea of what was right. Of course, it is understood you can bring out on redirect what it was.

Q. None of the holes that were dug under your direction and fine graded under your direction had anything wrong with them? A. Oh, yes.

Q. They did? [660] A. Sure.

Q. Did you keep track of them? A. No.

Q. Did you make any report of them?

A. No.

Q. Did you correct them? A. Yes.

Q. Now, wasn't it a fact, Mr. Stickney, to the best of your knowledge, that corrections were made wherever any error was determined?

A. The best of my knowledge, yes.

Q. That was done consistently on the job, was it not? A. That's right.

Q. And the hoe operation is a rough operation, is it not, Mr. Stickney? A. That's right.

Q. And a fine grading operation, as we said before, is a rather exact operation?

A. That's right.

Q. Was there any time while you were there that any of the Schaefer crew asked you to increase the width, the slope of the width of the excavation banks? A. No, sir.

Q. There was never any request made for that?

A. Not to me. [661]

Q. Yes, sir. Now, is it or is it not a fact that shortly after you came there you told Mr. Macri that Darcy, as superintendent of Concrete Con-

(Testimony of M. E. Stickney.)

struction Company, didn't know how to pour concrete? A. No, sir.

Q. That is not a fact, sir?

A. That's not a fact.

Q. And did you not tell Mr. Macri that the concrete operations being carried on under Darcy's direction were not being done right?

A. I don't recall that, no, as far as right was concerned.

Q. Didn't you tell Mr. Macri that they had the wrong type of equipment?

Mr. Olson: Well, I'm going to again object. I called Mr. Stickney, made him my witness, but to permit counsel to go into matters not even related to conversation, to now go into conversation between Mr. Macri and his superintendent, it seems they're going 'way beyond my direct.

Mr. Holman: This is preliminary to the instructions Mr. Macri gave this gentleman.

The Court: Preliminary?

Mr. Holman: Preliminary.

Mr. Olson: That's the same answer counsel makes every time, but it's never connected up with anything. [662]

The Court: I think this is improper cross-examination. Any conversation he had as to whether Schaefer's superintendent was doing his work right was not remotely connected with direct examination, unless you connect it up with something else.

Mr. Holman: I'm connecting it with conversations between Macri and this witness.

The Court: Later conversations?

(Testimony of M. E. Stickney.)

Mr. Holman: Yes, with respect to instructions to this witness.

The Court: Well, get the instructions first, and then we'll see whether you can come back to this or not.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you not have a conversation with Mr. Macri with respect to the Darcy operations of concrete pouring, and in connection with that, did not Mr. Macri say this to you, Mr. Stickney: "You let them run their job, and you run yours"?

Mr. Olson: That's objected to as not proper cross-examination, not relating to a matter covered or touched upon in my direct.

The Court: Not unless it has something to do with the excavations or fine grading.

Mr. Holman: That's what I'm getting at.

Q. Didn't he tell you to fine grade as well as you possibly [663] could, and to give the Concrete Construction Company nothing to complain about?

A. No, sir.

Q. He did not? A. No, sir.

Q. You never had such a conversation with Mr. Macri? A. No, sir.

(Whereupon, copy of Macri payroll for time of Stickney's employment was marked Defendant Macri's Exhibit No. 55 for identification.)

(Testimony of M. E. Stickney.)

Q. I have had marked for identification number 55, Mr. Stickney, which is intended to be a copy of the payroll for the time that you were at this job. Would you at your convenience or during recess, I see it's about recess, check that against the Macri payroll you're holding, and if you approve it, let me know if that's a correct copy?

A. I'll try.

Mr. Holman: May I suspend now, your Honor?

The Court: Yes, we'll recess for ten minutes.

(Short recess.)

(All parties present as before and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. As far as you have been able to, Macri's 55 for identification [664] has checked all right against the payroll? A. As far as I got.

Q. Would you kindly keep that, and let me—I'd like to defer, your Honor; I want it admitted.

The Court: All right, he can do it after he leaves the stand, and let you know what his check is.

Mr. Olson: I wonder if they have the person who prepared that? Just from a glance at that, I can see where it would take several hours to check every name and date that's on this exhibit. Has your Honor seen it?

The Court: No, I haven't.

Mr. Holman: It's just the payroll.

(Testimony of M. E. Stickney.)

Mr. Olson: But just to check that, that he didn't make, to check that for accuracy, a man can't do that.

Mr. Holman: I don't want him to check it for accuracy.

The Court: I believe it is unreasonable, Mr. Holman, to put the burden on the opposing witness of checking a document as voluminous as that. I believe you should at least make him your witness and pay for his time. It might take quite a while.

Mr. Holman: I didn't think Mr. Stickney felt he was under any compulsion, your Honor. He was off the stand. If they don't want him to do it, it's all right with me. [665]

The Court: Well, I don't know; it would take me several hours to check this.

Mr. Holman: I'll have a witness, your Honor.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Holman:

Q. On August 14, 1944, did you and Mr. Ashley and Mr. Macri have any conversation at the job office with respect to furnishing of lumber?

A. I don't recall whether we did that day or not.

Q. Now, isn't it a fact that the job office, the one Mr. Darcy says, the so-called office, the job office there, was adjacent to the lumber yard location?

A. That's right.

(Testimony of M. E. Stickney.)

Q. And isn't it a fact that a person in the office has a view of the area that was used for lumber?

A. Not unless you step outside.

Q. Oh, you have to step outside?

A. There was a tool shed on the back that cuts your view.

Q. Anyway, it was so accessible that it was a matter readily before you at the time?

A. It was.

Q. How much lumber would you say was there when you came on? A. I don't remember.

Q. Well, can you give me your best recollection?

A. In board feet? [666]

Q. Yes.

A. Almost impossible. I'll say there was some lumber there.

Q. Well, could you tell me whether there was a thousand, two thousand, five, or two hundred, or what? I mean unmade up.

A. Well, it would be a guess.

Q. Well, let's call it as "guestimate". Give me your best judgment.

A. Well, I'd say five hundred feet of ship-lap.

Q. Five hundred feet of board, ship-lap, not made up in forms?

A. As I remember; it's been a long time ago.

Q. Any two by fours?

A. I wouldn't know.

Q. Any plywood? A. Not in sight.

Q. Not in sight?

(Testimony of M. E. Stickney.)

A. I never saw any plywood for quite some time. That was kept in Mr. Schaefer's little private shed they had for their tools there.

Q. In other words, Schaefer kept the plywood under a more direct control?

A. That's right; it was in a shed.

Q. Plywood was a scarce article?

A. Yes, sir, I imagine it was. [667]

Q. Now, at that time you can't recall any conversation between Mr. Ashley, Mr. Macri, and yourself with respect to lumber?

A. No, not then.

Q. Between then and the next time Mr. Macri came back on the job, had you had any conversation with Mr. Darcy with respect to lumber?

A. I think he ordered lumber shortly after I was there.

Q. Give you a list? A. That's right.

Q. And you sent it on?

A. I imagine I telephoned it; I'm not sure. Usually did.

(Whereupon, an order blank with certain writing thereon was marked Defendant Macri's Exhibit No. 56 for identification.)

Q. You had on the job, did you not, from the start, a form or pad for orders to be given by you or requisitions to be made by you, all headed "Verbal orders don't go; write it"?

A. I believe that's right.

Q. And handing you identification 56, I will ask you if that was not one such order with respect to transportation of men, while you were on the job? Read it here. A. Yes, it was.

(Testimony of M. E. Stickney.)

Q. That was the form of communication that you sent between [668] the job office and Macri and Company?

A. Under such circumstances as that, yes.

Mr. Holman: I offer this in evidence, your Honor, as illustrative of the witness' testimony. It is the form of communication that I wish. Shall I go on?

The Court: Wait a minute, have you offered that? Did you get Mr. Holman's last statement?

(Whereupon, the reporter read Mr. Holman's last statement.)

The Court: Well, give counsel a chance to examine it, and he can make an objection, if he has one.

Mr. Olson: If your Honor please, I don't see the materiality of this identification 56. Certainly it does not touch upon any subject matter that I dealt with. It purports to deal with a crew.

Mr. Holman: I said, your Honor, it was merely for the purpose of form of communication. The contents I do not claim has any binding effect upon the plaintiff at all.

Mr. Olson: It's not proper cross-examination.

The Court: I'll sustain the objection. If you wish to put in one of these blank forms as one that was used down there on the job "Verbal orders don't go; write it," I would consider it admissible, but this has matters on it and attached to it that

(Testimony of M. E. Stickney.)

I consider not relevant to [669] this matter. It would simply be encumbering the record.

Mr. Holman: May I withdraw the matters and strike the contents, your Honor? I don't have another form here.

Mr. Holman: I don't, your Honor.

The Court: Well, we can paste over the written matter, and take off the attached ones.

Mr. Olson: Your Honor, I won't rest my objection on the contents. What I'm trying to get at is I don't care to ask the Clerk to go to all that trouble.

The Court: Well, let's just draw a line through it, and the Court can disregard it.

Mr. Olson: I still object on the ground it is not proper cross-examination, but not on the contents of the letter, if that can be X'd out.

The Court: Just "X" out the part below the printed portion on the top; otherwise the objection will be overruled.

Mr. Holman: The signature may remain, your Honor?

The Court: Is it his signature?

Mr. Holman: Yes.

The Court: That's right, to show that he used that form.

(Whereupon, Defendant Macri's Exhibit No. 56 for identification was admitted in evidence.)

(Testimony of M. E. Stickney.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Didn't Mr. Macri have a conversation with you on the job with respect to keeping the lumber supply adequate? A. Not adequate, no.

Q. I'll ask you if you were not told to get from the superintendent of the Concrete operations any list they wanted, and 'phone it in, and it would be over as soon as it could be secured?

A. That conversation never happened, no, that I recall.

Q. And weren't you told further, Mr. Stickney, that if there was any emergency you yourself could buy any lumber you wanted in any of the local markets here? A. I was not.

Q. Sir? A. I was not.

Q. You were never given that instruction?

A. No, sir, not that I recall.

Q. Were you ever given any instruction to the contrary?

A. Yes, I was. I did ask for that permission one time.

Q. And it was denied you?

A. It was denied, yes.

Q. When—where?

A. Oh, sometime during the job.

Q. When and in whose presence was that?

A. Over the 'phone. [671]

Q. You talking from—

A. The office to Mr. Macri.

(Testimony of M. E. Stickney.)

Q. And talking to Mr. Macri in Seattle?

A. Yes, I remember the conversation.

Q. And when?

A. I wouldn't know; sometime during the job.

Q. Now, did you know that forms have to be re-used? A. That's right.

Q. In order to make an economical operation?

A. I did.

Q. And did you know that Mr. Macri retained the title to the lumber after they were through?

A. I did not.

Q. You weren't told that; and did you know that lumber itself, both as to quality and as to quantity, was very scarce at that time on account of war emergency?

A. I knew lumber was scarce, yes.

Q. And didn't you know at that time that it took priorities to secure lumber? A. I did.

Q. And you discussed the priorities with Mr. Macri, did you not? A. I did not.

Q. And didn't you have a job priority available there yourself, Mr. Stickney? [672]

A. I believe I did use a job priority.

Q. Yes, sir; what was its number?

A. Not on lumber.

Q. What was its number?

A. I don't know; I can't recall the number.

Q. Didn't you have a job priority so that you could supply that job anything that you, Mr. Stickney, yourself, wanted for any portion of the performance?

A. There was a job priority there.

(Testimony of M. E. Stickney.)

Q. You never used it?

A. I used it somewhere, sometime. I remember using it for something, but it wasn't for lumber.

Q. Yes, sir. Now, didn't Mr. Macri tell you specifically to hire any and all kinds of help you wanted for your job? A. No, he did not.

Q. I see. Now, with respect to lumber again, didn't Mr. Macri tell you that if Schaefer's foreman, Mr. Schaefer's foreman, didn't give you enough time for you to order lumber from Seattle, for you to get it locally? A. He did not.

Q. I see, sir; and did Mr. Macri tell you to be very careful to give the Schaefer forces no chance to complain about either plenty of structures or plenty of lumber? A. He did not.

Q. All right, sir. Do you know approximately the quantity [673] pardon me, the number of structures that were poured, stripped and completed with back-filling while you were on the job?

A. No.

Q. Did you keep any record of that?

A. No record of that.

Q. You made no report to Mr. Macri on it?

A. No.

Q. Nor did Mr. Darcy or any of the Schaefer forces make any report to you? A. No.

Q. It is a fact, is it not, that you had hand shovels and mattocks and picks available for fine grading, for whatever crew you might desire?

A. That's right.

(Testimony of M. E. Stickney.)

Q. And it is a fact, is it not, that while you were there, none of the hoe excavations were retarded—pardon me—it is a fact, is it not, Mr. Stickney, that while you were there none of the hoe excavations for structures, structure excavations, were retarded because of lack of equipment?

A. Just for breakdowns?

Q. Oh, yes; well, there's always breakdowns on a job? A. That's right.

Q. Those were normal only, weren't they? [674]

A. I wouldn't say that.

Q. Was there ever a time when you asked for additional equipment? A. I did.

Q. When was that?

A. Shortly after I went there; I wouldn't know what date.

Q. Well, what did you ask for, Mr. Stickney?

A. I asked for a Cat, a Hoe, a ton and a half truck, and a pick-up.

Q. In other words, the equipment that Macri had there, you wanted replaced?

A. That's right.

Q. Well, did it work after you were there a while? A. Not very good.

Q. Well, did it work?

A. After a fashion.

Q. It did the digging, and it did the back-filling, didn't it? A. Not the back-filling.

Q. The Cat did the back-filling, didn't it?

A. Not while I was there; very little.

(Testimony of M. E. Stickney.)

Q. Oh, there was very little back-filling while you were there? A. Very little.

Q. Then there wasn't any really pressing use for the Cat [675] while you were there?

A. Not specifically.

Q. In other words, the Cat is attached to a 'dozer, and that pushes the 'dozer, and it is for the purpose of pushing considerable quantities of earth?

A. That's right; of course I needed it right along.

Q. Not in fine grading, did you?

A. Not in fine grading.

Q. I believe you said you left on December 9th?

A. Near as I remember.

Q. Now, it's a fact, is it not, that you neither notified Mr. Macri nor Mr. King that you were leaving? A. I did.

Q. Who did you notify?

A. I notified Mr. Macri first.

Q. How did you notify Mr. Macri?

A. By telephone.

Q. When?

A. I wouldn't now exactly; a few days before I left.

Q. Where did you call him, in Seattle?

A. Called him in Seattle.

Q. Sam Macri himself? A. That's right.

Q. I see. Well, with reference to your leaving on December 9th, and again may I give you the calendar, maybe we can [676] help you fix an approximate date at least.

(Testimony of M. E. Stickney.)

A. Oh, I wouldn't know; a few days before that, that's all I can tell you. I have no way of remembering what date.

Q. And did you notify him from the job?

A. From the job, yes.

Q. Did you notify Mr. King? A. Yes.

Q. On the job? A. On the job.

Q. Did you tell him, or did you write it?

A. I told him.

Q. Where? A. On the job.

Q. Where on the job?

A. I wouldn't know.

Q. Did you tell him when you were leaving?

A. Yes, sir.

Q. Wasn't it a fact, Mr. Stickney, that you had some malady at the time, wasn't it stomach ulcers, or something? You were suffering physically?

A. Not right at that time, no.

Q. Well, while you were on the job hadn't you suffered some physical disability?

A. Oh, I have for years.

Q. Well, while you were on the job did you suffer? [677]

A. Oh, as much as I have any time, yes.

Q. Then you did? A. Yes.

Q. And wasn't it because of that that you left the job? A. No, sir.

Q. And where did you go from there?

A. I went to Seattle.

Q. Back to Seattle? A. Yes, sir.

(Testimony of M. E. Stickney.)

Q. In other words, you didn't again return to the job after December 9th? A. No, sir.

Q. Were you subpoenaed in Lewiston, Idaho, to come here? A. No, sir.

The Court: He testified that he wasn't, didn't he?

Q. Oh, I didn't get that. And has your compensation been arranged, for your coming here?

The Court: He testified to that, too, I believe.

Mr. Holman: He testified to expenses before. I'm asking for compensation for time.

The Court: Oh, I see.

A. I don't know that it's been entered into, except as to expenses.

Q. What has been said? [678]

A. Just that the expenses would be taken care of.

Q. What expenses?

A. My expenses coming up here.

Q. How about your time?

A. I don't think there was any specific thing said about that.

Q. What do you mean, "specific thing"? What was said about it?

A. Said that my expenses would be taken care of.

Q. And there's been no arrangement made for payment of time to you whatsoever?

A. No.

Q. Nor have you asked any or contemplated any? A. No.

(Testimony of M. E. Stickney.)

Mr. Olson: I would be glad to submit my letter to Mr. Stickney. I have a carbon copy of it, if you wish.

Mr. Holman: It might be self-serving.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Again, one more thing with respect to lumber, Mr. Stickney. With reference to these exhibits, Plaintiff's 45, 46, 47, and 48, you have looked at those during the recess hours, have you not, sir?

A. Yes, I've seen them.

Q. Was there any other plywood on the job except that type that is shown by those identifications? [679]

A. I saw some, yes.

Q. You saw some good plywood too, did you not?

A. I did.

Q. And these would be the type of plywood that were near the point of exhaustion, wouldn't they?

A. That's right.

Q. And is that so as an operation right along?

A. That's right.

Q. Now, was there any time that there was not plywood available to line the structure forms?

A. I don't believe there were while I was there. It never was ordered through me, I don't believe.

Mr. Holman: That's all, Mr. Stickney.

(Testimony of M. E. Stickney.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Stickney, you were instructed by Mr. Macri to do the fine grading on these excavations on 1062? A. Yes, sir.

Q. And you performed those to the best of your ability, did you? A. That's right.

Q. And whenever Mr. Darcy requested that you fine grade a particular excavation you went back and did that, did you not?

A. I made every effort to, yes.

Q. And on several occasions he made requests that you fine [680] grade this excavation instead of that one?

A. I don't recall anything like that.

Q. At no time did he direct you in the order of fine grading?

A. No, other than he told me maybe that such and such a structure needed fine grading.

Mr. Holman: Who is "he"?

Q. Darcy. Did he ever direct you to call Mr. Macri? A. About what?

Q. Lumber? A. Yes.

Q. And did he ever direct you as to the speed of excavation?

A. Not excavation; fine grade was entered into several times.

Q. Yes. He never complained about the speed of your excavating?

(Testimony of M. E. Stickney.)

A. Not the hoe operation; is that what you mean?

Q. Yes. A. No.

Q. Did he ever complain to you about your fine grading? A. Yes.

Q. And you took immediate steps to correct it whenever he complained?

A. As much as I could, yes.

Q. Now, in connection with fine grading, the proper time to fine grade out there in that project would be just before the structure is set, isn't that right? [681]

A. Well, it doesn't blow too bad, if that's what you're getting at.

Q. That's what I'm getting at, yes.

A. That dirt doesn't blow too bad, only in certain spots.

Q. You can fine grade it and leave it for two weeks and it will be all right?

A. That's right, in some sections.

Q. But not in all sections?

A. I wouldn't say so, no.

Q. This may not be proper cross-examination, I'm not certain, but did you recall Mr. Darcy or the Concrete Construction Company having any difficulty with the roads? A. Yes.

Q. On many occasions?

A. Several occasions.

Q. And did the condition of the roads hinder their operations? A. It did.

Mr. Hawkins: I think that's all.

The Court: Mr. Ivy?

(Testimony of M. E. Stickney.)

Mr. Ivy: No cross-examination, your Honor.

Redirect Examination

By Mr. Olson:

(Whereupon, written statement of M. E. Stickney was marked Plaintiff's Exhibit No. 57 for identification.)

Q. I will ask you, Mr. Stickney, do you have a letter I [682] wrote to you requesting that you come over for this trial, with you?

A. I'm not sure whether I have that or not; I believe I have.

Q. Is this the envelope?

A. I believe it is.

(Whereupon, letter from Mr. Olson to M. E. Stickney was marked Plaintiff's Exhibit No. 58 for identification.)

Q. Mr. Stickney, showing you plaintiff's identification 57, I'll ask you to examine that and advise me whether or not your signature appears on that document?

Mr. Holman: Just a minute. Objected to as improper redirect.

The Court: Is this the statement he gave to you?

Mr. Olson: Yes, this is the statement that counsel interrogated the witness about.

Mr. Holman: Not one thing, your Honor. I read it and handed it back.

(Testimony of M. E. Stickney.)

Mr. Olson: Oh, no. He asked how it was dictated whether his wife objected to anything put in there——

The Court: Just a moment; go ahead.

Mr. Holman: I was going to say, I didn't interrogate him about any of the contents as such, merely the preparation of it.

Mr. Olson: Your Honor, he asked where it [683] was taken, and whether or not Mr. Darcy suggested the contents. It's true he didn't read the statement, but it is referred to and gone into on the cross-examination, and all about it, and now it seems to me if counsel wants to do that, then I'm entitled to introduce the document into evidence to which he was referring.

The Court: Well, I'll overrule the objection and admit it. I think there was testimony regarding its preparation, at any rate, and whether some suggestion wasn't made by the wife as to how it was to be answered, and so on. It does have a reference to the contents, anyway.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Is this the statement that was in your wife's handwriting as you testified.

A. That's right.

Mr. Olson: We offer plaintiff's identification 57.

The Court: However, I think it should be introduced merely for the purpose of explaining the

(Testimony of M. E. Stickney.)

circumstances of the making of the statement, and going to the bias of this witness. It isn't to be substantive evidence of its contents.

Mr. Holman: Under that circumstance I have no objection at all.

Mr. Hawkins: I object further on the ground it is [684] a prior consistent statement, and as such is not admissible.

The Court: Well, I haven't seen it yet.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Stickney, showing you plaintiff's identification 58, I'll ask you to state what that is.

A. This is a letter that I received from Mr. Olson, of Mr. Palmer's office in Yakima, Washington, asking me——

Mr. Holman: Just a minute, Mr. Stickney; I object to your telling the contents.

The Court: Yes, don't tell the contents; just tell what it is.

Mr. Olson: Well, we offer plaintiff's identification 58.

Mr. Hawkins: I don't see the materiality of that, your Honor, and I object to it for that reason. It is rather an innocuous document.

Mr. Olson: Well, if counsel goes into these things on cross-examination, I assume they feel they're material or they wouldn't examine with reference to them.

(Testimony of M. E. Stickney.)

Mr. Hawkins: I didn't cross-examine with reference to them.

Mr. Olson: I concede you didn't, Mr. Hawkins, but one of defense counsel did.

The Court: I think I perhaps ruled too hastily on [685] this other document here. Mr. Hawkins hadn't been given an opportunity to object. Is there any contention at all here that he has made a statement inconsistent with his testimony?

Mr. Olson: Well, I don't contend that he did, your Honor.

The Court: If there is any such, this should be admitted to rebut that, but as I recall the testimony, there isn't any evidence that his statement was inconsistent. I'll reverse my ruling on that, and sustain the objection to it, with that understanding. It is my understanding there isn't any evidence showing the statement was inconsistent. There is some showing of the method in which it was made, but I don't think there was any showing about the contents being inconsistent, or the contents at all; and 58, there isn't any contention that he's to be paid more than his expenses, so I will sustain the objection to that.

Mr. Holman: Your Honor—pardon me, I didn't mean to interrupt.

The Court: I was just going to say this; this identification is in here, and if it should be contended that he's to get compensation other than his expenses, this might be material at some future time, but I'll sustain the objection now. [686]

(Testimony of M. E. Stickney.)

Mr. Holman: Your Honor, in view of your Honor's change of position, I said I had no objection to 57, being offered as proof of transmittal but not substance, then Mr. Hawkins raised a different objection in which I would like to join.

The Court: Yes, you may join.

Mr. Holman: And then your Honor's ruling will be correct.

Mr. Hawkins: I think the witness should be advised if he expects any more, that he should claim it right now.

Mr. Olson: I suggest counsel leave that up to us.

The Court: All right, proceed.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Stickney, you testified on cross-examination with reference to the availability of men for fine grading, and the availability of picks, shovels, and mattocks. State whether or not there was anything else which was required by you in order to timely do your fine grading.

A. Transportation.

Q. And did you have the transportation?

A. I did not.

Q. And were you then delayed in your fine grading? [687]

A. Yes, sir.

(Testimony of M. E. Stickney.)

Q. And when Mr. Darcy requested you to return with your fine graders and do some fine grading on some holes back, were you able to do that promptly?

A. Not very promptly, as a rule.

Q. Now, with reference to the holes that were dug by hand, and counsel asked you about on cross-examination, asked you if they were dug right, what was the situation with reference to the slope, if any, on those holes?

A. They were dug the same as the others.

Q. And that's how?

A. Vertical banks, one foot outside of the neat concrete line.

Q. Now, you said that you called Mr. Maceri on the 'phone on various occasions concerning lumber. Do you know about how often you would do that?

A. Well, that depends on—when he would order the lumber I would call him repeatedly until I got the lumber.

Q. Well, how many times would you call him, say, in a week's time?

Mr. Hawkins: Your Honor, I may be mistaken, but I thought I asked the witness that very question and he couldn't remember.

A. I couldn't say correctly.

The Court: Well, he's answered the same [688] way, that he can't remember.

A. Not correctly.

The Court: All right, go ahead.

(Testimony of M. E. Stickney.)

Mr. Olson: Your Honor, he's testifying to a different thing. Counsel asked him how many times he ordered the lumber. Now he's referring to how many times he had to call up to get the lumber after it was once ordered, as I understand it.

The Court: Well, ask him the question, then.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Do you recall, Mr. Stickney, approximately how many times after you had ordered the lumber you would have to call, say in a week's time, about it's non-delivery?

A. Well, that varied.

Q. Well, from what to what?

A. Well, it depended on what time we would receive the lumber, and what time the order was given.

Q. Well, would you have to repeatedly call Mr. Macri to get your lumber?

A. I wouldn't say every time, but a great many times, yes. I wouldn't say a good many times, because there wasn't a good many times ordered, but whenever it was ordered, why, I don't recall any time getting it the first time I called for it, right now.

Q. You referred also on cross-examination with reference to [689] some conversation over the 'phone with Macri as to giving you authority to buy some lumber locally. Now, I understood you to say you remembered some specific conversation?

(Testimony of M. E. Stickney.)

A. We did have some specific conversation about that.

Q. Would you relate what it was?

A. Well, I can't say exactly what it was.

Q. Well, the substance of it?

A. Only that I was denied the privilege to buy the lumber as we needed it, because he was supposed to have plenty of lumber over there, and there was no use; that was his excuse, as I remember it.

Q. Now, when you were out on this job it was during the summer, is that right?

A. That's right.

Q. What was the situation with reference to it being windy out on the project during August and September?

A. There was quite a number of windstorms, yes.

Q. There were some windstorms? A. Yes.

Mr. Olson: That's all.

Recross-Examination

By Mr. Holman:

Q. Mr. Stickney, you've answered counsel on your redirect that transportation of the men was the thing that was preventing you from doing fine grading? [690]

A. That's right.

Q. Didn't you have a pick-up truck yourself?

A. I had a pick-up truck, yes.

(Testimony of M. E. Stickney.)

Q. And didn't you have a pick-up truck for the men? A. Not for the fine grade crew.

Q. Well, for the men?

A. For Jim Black, yes.

Q. Jim Black, and he was a fine grade man, wasn't he?

A. Not altogether, as I stated before.

Q. Well, didn't you tell me you put him on for fine grading?

A. That was the idea when I hired him.

Q. You mean Black's truck wasn't large enough for this crew?

A. Black had to stake out ahead of the hoe, and he couldn't stake and keep switching back and forth, because fine grading, a man's got to be with his crew every second.

Q. Didn't you make a request for a pick-up truck? A. Not——

Q. That was the difficulty that you and Mr. Black had between yourselves on the job, that you solved yourselves on the job?

A. I just don't understand you.

Q. I'll strike the question; maybe it is confusing to you. That matter was one that you and Mr. Black handled yourself on the job, the matter of getting the men back and forth? [691]

A. That's right.

Q. And you did your best to do it, did you not?

A. Yes.

Q. And you used all the transportation facilities you had? A. I did.

(Testimony of M. E. Stickney.)

Q. And the transportation facilities you had were for that purpose? A. I did.

Q. And you made no requisition for any additional transportation?

A. I made no requisition, but I made demands.

Mr. Olson: What do you mean by requisitions?

Mr. Holman: I think the witness knows.

Mr. Olson: Well, he testified he made request for a truck and a pick-up truck.

The Court: Just a minute; you may have him explain. Requisition has a common meaning.

Mr. Holman: You ask me to explain to him requisition?

The Court: No. The term requisition I think has a common meaning, and if it has other than that, counsel for the plaintiff may bring it out on redirect. You may go ahead.

Mr. Holman: I have no more questions.

The Court: Mr. Hawkins? [692]

Recross-Examination

By Mr. Hawkins:

Q. Did Mr. Darcy ever given you a written order or a bill of materials that he needed?

A. Yes.

Q. And did he ever give you that, say, two weeks before he needed that material?

A. I believe he has.

Q. On how many occasions?

A. You mean how many occasions that far ahead?

(Testimony of M. E. Stickney.)

Q. On how many occasions did he give you such bill of material two weeks in advance?

A. As I recall, there usually was an order for lumber in the office all the time.

Q. But you don't recall how many occasions he gave you a bill of materials two weeks in advance? A. No.

Recross-Examination

By Mr. Holman:

Q. Did Mr. Darcy at any time give you a written notice of any defects in the construction?

A. No.

Q. In the excavation? A. No.

Q. Sir? A. No.

Q. Or in the fine grading? A. No. [693]

The Court: Is that all for this witness? Then may he be excused?

Mr. Olson: Yes, may Mr. Stickney be excused?

The Court: You mean from attendance? I meant from the stand. Is there any objection to the witness being excused?

Mr. Hawkins: I have no objection to the witness being excused.

Mr. Olson: You may step down.

Mr. Holman: Just one minute. We have no objection to his going, your Honor.

The Court: You may be excused from further attendance on the court, then, Mr. Stickney.

(Whereupon, there being no further questions, the witness was excused.)

The Court: It is too late, I think, to call another witness before recess. Today I'm going to take a two-hour recess. We'll recess until 2 o'clock, and then continue in session until 4:30 instead of 4 o'clock.

(Whereupon, the Court took a recess in this cause until 2 o'clock p.m.) [694]

Yakima, Washington, Friday, February 28, 1947,
2:00 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, before counsel calls his next witness, with his consent I would like to have Macri's 55 identified for the purpose of introduction by calling Miss Callahan.

Mr. Hawkins: May I address the Court?

The Court: Yes.

Mr. Hawkins: Your Honor, Mr. Henry found his assignment finally, and sent me a copy of it, and I'm not offering it in evidence at this time, but I'll hand it to the Clerk so it will be possession of the Court. It will be offered at an appropriate time, and I am also offering the copy of the contract hardship claim by Macri and Company. That will be offered at a later time. I want that letter to go with it. I have in my hand the claim from which that copy I handed the clerk was prepared. This is a file of Depew and Ferguson, in Seattle, who represent the Macris in this particular matter. Apparently it is the only instrument in existence except the ones in the hands of the government.

officials, and I would like permission to withdraw that and return it to Depew and Ferguson so they will have their file complete. [695] My girls have prepared this copy, and have proof read it.

The Court: How soon did they want it back?

Mr. Hawkins: Well, as soon as they can get it back.

The Court: Well, I wouldn't like to let the originals go until the other counsel have a chance to examine them and concede that it is a true copy. We might get in a position where they would object to the copy.

Mr. Hadkins: This is just a copy itself, your Honor, not the original. The one that I have from Depew and Ferguson is a carbon copy of the original.

The Court: But it is the only copy; I understood it was agreed by everybody here that a copy from that office could be put in here; that is, there wouldn't be any objection so far as being a copy is concerned.

Mr. Hawkins: Mr. Goerig says it will be all right to leave it here until Tuesday or Wednesday, and everyone can have an opportunity to look at it.

The Court: And when you introduce it, I'll give you permission to substitute a copy.

Mr. Olson: As far as Mr. Schaefer is concerned, if Mr. Hawkins says what he has is a copy of the instrument, we will raise no objection to it.

Mr. Hawkins: My secretary checked it. That probably [696] has more probative value than my statement.

ELIZABETH CALLAHAN

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your full name, please, and you'll have to talk loud, Miss Callahan.

A. Elizabeth Callahan.

Q. Where do you reside? A. Seattle.

Q. And what is your employment with Macri and Company?

A. I'm the general office worker.

Q. And in connection with the Macri payrolls for the Sunnyside job, specification 1062, schedule 1, I'll ask you whether or not under my direction you prepared what has been marked Macri's 55 for identification, either prepared it or it was prepared under your direction?

A. Yes, it was prepared under my supervision; part of it I did.

Q. Part of it is actually your writing, and the rest is under your supervision?

A. And I checked it.

Q. Now, with reference to the first page of 55 for identification, is that a full and complete showing including the breakdown detail of the checks of the various men, as to medical aid, withholding tax, and so forth and so on, [697] and the net amount and the ultimate payment? A. Yes.

Q. Then when you turn to the second page and the subsequent pages have you left that detail off?

A. Yes.

(Testimony of Elizabeth Callahan.)

Q. You did that at my direction, but does the account throughout show the amount paid the men and the check by which they are paid?

A. Yes.

Q. And that covers for what period of time, Miss Callahan?

A. From the week ending August 16, '44.

Q. Which would begin on what date?

A. Would begin on the 10th.

Q. All right, to and including which date?

A. To and including the week ending December 13, '44.

Mr. Holman: You may inquire, counsel.

Mr. Olson: I have no questions.

Mr. Holman: I may not have asked you this. I should. Is this a full, true, and correct copy of the payrolls themselves? A. Yes, sir.

Mr. Holman: I offer it in evidence, your Honor, in conjunction with the direct and cross-examination of the witness Stickney, to show the men actually employed and the pay actually received by those men for that [698] period.

Mr. Olson: Your Honor, I object to its introduction, first, that if it is a true and accurate and complete copy of the payroll for those periods, it is then not the best evidence as far as that period is concerned, that is, if it is a complete copy it certainly isn't offered as a compilation, and secondly, that it is a self-serving document, fully immaterial, doesn't relate to or prove any of the issues that are framed in this case.

(Testimony of Elizabeth Callahan.)

The Court: If it is a copy it seems to me that it is subject to the objection that it isn't the best evidence.

Mr. Holman: If counsel raises that, I don't urge it, because it is very evident that I had the copy, and I understand when Mr. Stickney was checking it, counsel made the suggestion that we have it checked by our own people and vouched for. If he raises the question it is not a copy, I'm not going to urge that.

The Court: Why not follow the usual procedure of offering the original and substituting a copy?

Mr. Holman: If I do that I'll have to take the breakdown of each one of these checks, in other words, total amount earned, total of old age benefits, medical aid, withholding amount; on the subsequent it doesn't [699] show; on the payroll it does, for every man, all the way through. Miss Callahan testified that at my direction she omitted these items, which can't be pertinent in this case.

The Court: It isn't an exact copy, then?

Mr. Holman: It is not.

Mr. Olson: I thought she said it was. That's the point I make, that if it was an exact copy, then I preferred that the originals went in; if it is, a compilation, that's a different matter.

The Court: It doesn't appear to be a compilation. It appears to be a partial copy, with some items omitted.

Mr. Holman: Your Honor, the first page is a complete copy of that page of the payroll. The

(Testimony of Elizabeth Callahan.)

subsequent pages leave off the breakdown of the man's deductions. I can have Miss Callahan complete it, if necessary. In view of counsel's objection, your Honor, I'll withhold the offer, and I'll ask Miss Callahan to complete this in its entirety.

Mr. Olson: Your Honor, I don't wish to require that. I think I now understand what counsel is doing.

The Court: I am not sure that I do.

Mr. Olson: Well, as I understand, there's some information on the original payroll that counsel has omitted from this compilation. Except for that omitted, [700] the rest is a complete copy.

The Court: What is omitted?

Mr. Holman: The breakdown, your Honor, of the deductions for Federal Old Age Benefits, medical aid, and withholding tax, and total deductions; that would be those deductions carried through.

The Court: Are they just noted in the copy, and not itemized?

Mr. Holman: They are not shown, except on the first page by way of illustration. It is pure detail, if counsel wants it.

The Court: It does contain the names of all employees?

Mr. Holman: Their wage, and the time they worked, and the check they paid them with, so that if they want any particular man, we can produce the check.

The Court: Have you any objection?

(Testimony of Elizabeth Callahan.)

Mr. Hawkins: Yes, I do. I object to the introduction of this exhibit as proof of the fact that these individuals worked on that job. I do not see how that can be proved by this document. I think that could be proved only by the men themselves, or by the superintendent who was there at the time. This is merely hearsay, twice removed, if it is offered in proof of that matter. [701]

Mr. Holman: It is offered, your Honor, in furtherance of Mr. Stickney's identification of the payroll sheets that are now reproduced.

The Court: Well, I thought the purpose of Mr. Stickney's cross-examination on the payroll was to show that he himself worked and what his salary was, and also that he had authority to hire others, and that he had done so, and that he had hired them and turned in their time on this payroll, and it is my understanding that he didn't identify every sheet of this payroll.

Mr. Holman: He did for the time he was there, I think, your Honor, in the record. At least I asked him to.

The Court: Well, didn't everything you asked him about that go in, oral evidence?

Mr. Holman: Except the detail, your Honor.

The Court: I thought he was just consulting that to refresh his memory, and then was testifying as to what salary he got and what men he employed.

Mr. Holman: I didn't ask him page by page, for the mere purpose of saving time, but your Honor will recall that he did identify it, and started checking on this one to approve it.

(Testimony of Elizabeth Callahan.)

The Court: He got part way through, and then didn't finish. It is my understanding that it isn't in [702] the record that these men shown in the payroll worked on one of these sub-contracts, 1062 or 1068.

Mr. Holman: Not by Mr. Stickney's statement, except that that was the payroll for that period.

The Court: Well, wasn't he superintendent on other work besides these two sub-contracts?

Mr. Holman: 1062 is all. I don't think he was on 1068 at all. Did you have him testify to 1068?

Mr. Olson: I didn't have him testify to 1068 at all.

The Court: I'm not sure about this, I don't know whether it's been brought out in the evidence; did Mr. Macri have a contract that covered portions of the Roza Project other than 1062 and 1068, or were his operations confined to those contracts?

Mr. Holman: That's correct, 1062, schedule 1, and 1068 were the two contracts.

The Court: And you're offering this for the purpose of showing these men worked on the job?

Mr. Holman: No, your Honor; for the purpose of showing the payroll for that period while Mr. Stickney was superintendent.

The Court: And how is that material?

Mr. Holman: It is material as a defense in refutation of Mr. Stickney's statement that there was a [703] shortage of manpower.

The Court: What was your understanding as to how thoroughly this was identified, Mr. Hawkins, if I may ask?

(Testimony of Elizabeth Callahan.)

Mr. Hawkins: Well, my understanding on that, your Honor, was as your Honor just stated; this man used that exhibit to refresh his recollection, and I do not believe he testified that all of the men on that payroll worked the days indicated and were paid the amounts indicated, and that is the point I'm getting at, of course.

Mr. Holman: All I asked him was if it was a true payroll for that period, and he said it was.

The Court: I don't see how he could say that, because he didn't check it all.

Mr. Holman: He checked this one, the payroll, himself, and said it was in his own handwriting.

Mr. Hawkins: Counsel says he's offering this as proof of the payroll. I fail to see the distinction between that and offering it as proof the men worked on the job and were paid a certain amount, and I don't think there's been sufficient evidence to qualify that, as yet.

The Court: I don't believe it has been sufficiently identified.

Mr. Holman: With the Court's permission, I thought I had the cooperation of counsel, but I guess I [704] didn't, I'll ask the privilege of withdrawing the exhibit and delivering it to Miss Callahan for the purpose of completing it so it may be completely identified, and then I'll leave it until the testimony completely supports it. Will you leave the stand, Miss Callahan?

(Whereupon, the witness Elizabeth Callahan was temporarily excused from the witness stand.)

(Whereupon, Certificate of Assumed Business Name was marked Plaintiff's Exhibit No. 59 for identification.)

Mr. Olson: If your Honor please, I offer in evidence plaintiff's identification 59, which is a certified copy of the certificate of assumed business name filing of the Concrete Construction Company, which has already been submitted to counsel as having been filed February 27, 1947.

Mr. Hawkins: February 27?

Mr. Olson: Yes, that's yesterday. I appreciate that counsel is—I'm not asking them to concede it is timely filed, neither am I conceding that it is necessary to file it, but there is rather an interesting set of cases on the State law, which I think is entirely inapplicable, but I would like to have it shown that it was filed on that date.

The Court: It is conceded that there was no filing [705] other than that time? What is that identification number?

Mr. Olson: 59.

Mr. Hawkins: Your Honor, we object to the admission of plaintiff's identification 59 into evidence for the reason that it is incompetent to comply with the State law. If the State law is applicable in this Court on this matter, filing the assumed name may be done at any time prior to the commence-

ment of the trial, but I know of no case that holds that filing of it during trial was sufficient compliance with the statute.

Mr. Olson: No case that says it isn't, either.

Mr. Hawkins: The statute itself is very explicit that no one can maintain an action unless that has been done. I take it if the language of the statute was followed then there would be no alternative but for the Court to dismiss the case. Whether or not the statute may be construed later to mean that filing during trial is sufficient, I don't know. I think the bare wording of the statute plus the cases to date would indicate that a filing at this time is too late, and for that reason we object to its admission in evidence.

Mr. Holman: We join, your Honor.

The Court: Well, we have rather a peculiar situation here. I think that there are two questions, [706] at least, that are raised by this failure to file a trade name certificate. One is whether that law is applicable to an action such as this, in Federal Court. The other is, if it does apply, whether the objection must not be raised by demurrer or answer prior to the beginning of the trial; in Federal Court that would be a motion for dismissal or answer. It is not in the answer, and I wasn't in this case from the beginning, and it is my understanding that it hasn't been raised; at least the pleadings don't indicate it was raised, and since there are cases which hold the objection wasn't timely, I'll overrule the objection and let it come in for what it may be worth, if anything. I don't know, frankly.

Mr. Olson: I'll just feel a little better by knowing it was done.

Mr. Hawkins: I don't like to weaken my own position in this respect, but it occurred to me possibly the situation of a foreign corporation suing in the Federal court, where it had not complied with the State laws, might be in point. I checked those cases, and apparently there is a division of authority. Some say the State legislature has no power to affect the jurisdiction of the Federal court, and therefore the failure cannot prevent its maintaining an action in Federal court. There [707] are other cases which hold to the contrary. I just suggest that there is a line of cases that might be some help.

The Court: Well, thank you. Frankly, I am inclined to think that this certificate, to have any effect, must be filed prior to the trial, but Ill let it in for what it is worth.

Mr. Hawkins: I had the identical situation in Judge Findley's court in Seattle, and the offer was made during trial. Of course, that had the effect of amending the pleading and also of amending the answer, to the effect it had not been properly complied with. I think if this is admitted it can be admitted only to the effect that plaintiff's complaint be, by implication, amended to plead a compliance with this law, and I think by the same token the defendants are entitled to amend their answers to deny a compliance with the state law, and in that regard I so move at this time.

Mr. Holman: I join, your Honor.

The Court: I think that's a reasonable position. The complaint would have to be construed as amended to conform to the proof here. There is no allegation that the certificate was filed, and it is so considered, that it will be amended to show the filing as of this date, and it will be understood that the defendant's answer [708] will be considered to show that it was not proper compliance.

Mr. Olson: I also intend to show that at the time of the deposition of Mr. Schaefer on September 27, 1946, all the parties had full knowledge that Mr. Schaefer was the sole owner of the Concrete Construction Company, and that there could be no possible prejudice against any of them. I'll show that at the proper time. I guess the deposition is on file now.

The Court: Was that after the commencement of the action?

Mr. Olson: That was after the commencement of the action, but long before the trial, and as counsel says, the cases do show a filing before trial is timely. There are no cases that I have been able to find that hold either way that you cannot file during trial. They do hold that filing up to trial is timely. My position is that it is timely in view of the deposition, in which they were advised of all the facts. That's assuming, of course, that the State law has some applicability.

The Court: Well, I'm letting it in, but I'll keep an open mind on it during the trial.

(Whereupon, Plaintiff's Exhibit No. 59 for identification was admitted in evidence.) [709]

FRED WALTIE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your full name, please.

A. Fred Waltie.

Q. And how do you spell your name?

A. W-a-l-t-i-e.

Q. Are you the gentleman, apparently, who was referred to in some of the field reports as Mr. Wittie?

A. That's right.

Q. At least, you were on the job at the time that they referred to Wittie?

A. That's right.

Q. I thought we ought to tie that up. Mr. Waltie, by whom are you employed now?

A. State Highway Commission of Oregon.

Q. Are you in any way connected with Mr. Schaefer's operations?

A. No.

Q. When did you go to work on 1062, if you did?

A. In April of '44, I believe. [710]

Q. When with reference to the commencement of operations by Mr. Schaefer?

A. Well, it was shortly after he took the contract, although there had been some work done previous to his taking the contract.

Mr. Holman: May I have that answer?

(Whereupon, the reporter read the last previous answer.)

(Testimony of Fred Waltie.)

Mr. Holman: I move that last portion be stricken as volunteered, your Honor.

The Court: It may be stricken.

Mr. Olson: Then, so that I'm clear, the part that's left in is that it was shortly after Mr. Schaefer took the contract?

The Court: Yes.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you recall, Mr. Waltie, and will you describe, whether or not there were any excavations completed with fine grading when you went on the job? A. No.

Mr. Olson: Now, I'm not sure that answers it. I think my question was a little bit double.

The Court: Well, clarify it if you wish.

Q. Were there excavations there fine graded, Mr. Waltie? A. No. [711]

Q. And would you describe what the situation was with reference to the excavations as you saw them when you went on the job?

A. Well, they hadn't been started yet.

Q. The excavations had not yet been started?

A. No.

Q. What was the experience you had with the excavations as they were when they were commenced by Macri Company?

A. Well, they weren't accurate.

(Testimony of Fred Waltie.)

Q. I don't know if I asked you, were you Mr. Schaefer's superintendent on the job?

A. Yes.

Q. And in what respects were they not accurate, Mr. Waltie?

A. Well, they were just not dug properly.

Mr. Holman: I move that be stricken as a conclusion, your Honor.

Mr. Olson: I'll try to get it. Describe the banks.

Mr. Holman: Well, just a minute.

The Court: I think that the answer may be stricken, that they were not dug properly. It's a conclusion.

Q. Describe the conditions of the banks on the excavations.

A. Well, they were cut vertically instead of on a 1 to 1 slope.

Q. Now, describe the fine grading as it was performed by [712] Macri and Company.

A. To actually define it—well, it just wasn't right.

Mr. Holman: I move that be stricken, too, your Honor.

The Court: Well, that will be stricken. You'll have to describe it, Mr. Waltie. You see, I can't tell what your conception of what wasn't "right" was, and the record doesn't indicate.

Q. If it wasn't right there must have been something wrong with it, Mr. Waltie. What we would like to have you do is explain what it was.

(Testimony of Fred Waltie.)

Mr. Holman: Object to that as leading and suggestive.

The Court: Well, you can ask him what the condition was.

Q. Just explain what the condition was with reference to fine grading.

A. Well, the fine grading was not brought to the proper levels, in some instances either too high or too low, and the side cuts, that is, of the structure itself, were inaccurate, that is, they were not cut—they were cut back too far or not far enough.

The Court: Does this testimony still relate to April, 1944?

Q. Well, this relates to the first excavations which were [713] done. When were these, Mr. Waltie?

A. I believe it was the first part of June. That could be referred to on the reports that I made at that time.

Q. I wonder, Mr. Waltie, if you would step down to plaintiff's exhibit 23 and 25, and remove the exhibits inside, if you wish, and explain, Mr. Waltie, what walls you refer to were not to grade, or what elevations were not to grade, using this exhibit 25 as a model?

A. This is just an illustration, because I wouldn't say that would be in any one particular case, but this elevation was wrong, or this elevation, or by side cuts I meant this particular part here, was either left too far out, or it was cut back too far, and the same thing pertains to this one.

(Testimony of Fred Waltie.)

The Court: You should refer to numbers.

Mr. Olson: I wonder if we couldn't have those sub-elevations marked?

The Court: They are marked.

Mr. Olson: Well, as I understand it, 25g is simply the slanting part of that elevation.

The Court: Yes, I think that's right.

Mr. Olson: The sug-grade itself I don't believe is identified, if I correctly understood the markings.

The Court: Yes, that's right. [714]

(Whereupon, portions of plaintiff's Exhibit 25 were marked 25h, 25i, 25j, and 25k.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Waltie, in describing those sub-elevations would you again, using this Exhibit 25 as a model, illustrate by referring to them by number and sub-letter the elevations that you refer to?

A. Well, 25k would be wrong.

Q. And in what respect, Mr. Waltie?

A. It would either be too low or too high.

Q. All right.

A. And 25h would either be low or too high, which also is the case with 25i and j.

Q. Now, how about the sub-wall or curtain walls, I believe, as they were referred to, being 25c and 25d; were those excavated by Macri and Company on the excavations as you found them while you were superintendent? A. You mean——

Q. Im talking about 25c and——

(Testimony of Fred Waltie.)

A. Oh, no, I never encountered one of those.

Q. And what would you have to do about the excavations before you put the forms in, if anything?

A. Have to have one of the carpenters dig that.

The Court: What are those slots called?

Mr. Olson: Sub-walls, I think. [715]

Q. Now, how about the excavations in any other respect, Mr. Waltie, as compared with the specifications?

A. Well, this 25b could either be cut back too far or not far enough.

Q. And what would you have to do to correct those situations, if anything?

A. Well, in some cases if they were cut back too far we had to crib the wall of 25b so that the earth could be put back in there.

Q. What do you mean by crib the wall of 25b?

A. Well, you put a form up there in reverse. What I mean is, to create a flat surface here for the concrete to go against, and still retain the earth that is loose.

Q. And could you leave that cribbing in there after you poured the form?

A. It was definitely against the rules and regulations of the Bureau.

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, I'll strike the answer.

(Testimony of Fred Waltie.)

Q. That cribbing, when it was put in there, Mr. Waltie, would that have to be removed or could it be left there before the forms were poured?

A. Well, it couldn't be left there.

Q. And after the cribbing was put in place would you have to do anything with reference to filling in any space in [716] there in the soil?

A. Well, we had to place the dirt in there, yes.

Q. And describe that process; in other words, just tell what you had to do, Mr. Waltie.

A. Well, you had to shovel in dirt, and it was supposed to have been compacted, although I never actually did do that any instances that I done that.

Q. Now, how about 25g and 25f and 25e; were those parts of the excavations performed when you got to the excavations? A. No.

Q. And who performed that work?

A. The carpenters on the Concrete Construction crew.

Q. Were all the excavations on the job that you worked on exactly like Exhibit 25? A. No.

Q. But did the other structures have sub-excavations and curtain walls and the other fine grading?

A. Not all of them, no.

Q. Some of them didn't; all right, you may return to the stand. Now, when you first come on the project what was the first thing that you started to do as far as Concrete Construction Company, what was the first work you were doing?

A. Building form panels.

Q. Building forms? [717]

A. Form panels.

(Testimony of Fred Waltie.)

Q. And where was that done?

A. At the yard site.

Q. What was the situation with reference to stock piles of lumber on hand?

A. Well, I wouldn't say as to immediate arrival, but shortly thereafter that we were out of lumber of certain sizes.

Q. And did that delay your operations any?

Mr. Holman: Oh, I object to that as leading, your Honor.

The Court: Well——

Q. Explain how that affected your operations, if it did?

A. Well, we couldn't complete panels, or make panels enough to complete structures so that we could set them.

Q. What was the quality of the lumber that was furnished you? Describe that.

A. Well, it was new lumber.

Q. And by that what do you mean?

A. Well, it was average lumber that you'd buy.

Q. Well, was that suitable for forms?

A. Yes, it was.

Q. And was that true with the lumber throughout the time you were on the project?

A. Well, as a matter of fact, that's the only lumber that was on the project while I was there.

Q. When was the first excavation ready, or when were you notified, if you were so notified, that the first excavation was ready for installation of forms?

(Testimony of Fred Waltie.)

Mr. Holman: Just a minute, your Honor, I object to that question until there is a showing of necessity to notify. You mean notified by your crew?

Mr. Olson: No, by Macri and Company.

Mr. Holman: I object to that. There is no necessity for notice.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: My objection to the question is there is no obligation on the principal contractor to notify the sub-contractor anything, so therefore it is immaterial.

The Court: I'll sustain the objection to the question in that form, until it is shown that he was notified, or if he was notified.

Direct Examination

(Continued)

By Mr. Olson:

Q. Were you notified, Mr. Waltie, by Mr. Macri's employees, or one of his employees, that an excavation was ready for concrete forms?

A. Yes.

Mr. Holman: I have no objection to that. That is factual. [719]

Q. Do you recall the approximate date that you were so notified?

A. It was the first part of June. I'm not sure of that either; it's on the records.

(Testimony of Fred Waltie.)

Q. Well, we have the records. Are those the records you kept yourself? A. Yes.

Q. Referring to plaintiff's identification 52, Mr. Waltie, and to that part of those records pertaining to the time you were on the job, were they prepared by you? A. Yes.

Q. Well, now, would you refer to the sheet covering April 14, 1944?

The Court: You're just using this to refresh the witness's memory, I assume.

Mr. Olson: Yes, that's correct, your Honor. I thought rather than have him thumb through all those papers, I would direct him to that page, if my note is correct.

The Court: All right.

A. That's what date?

Q. April 14, 1944. Is there a notation—or, refreshing your recollection from notations which may appear on that page, Mr. Waltie, was there any notification given to you with reference to excavations? [720]

A. It doesn't on the 14th, but it does on the 15th.

Q. All right, on the 15th.

A. The notation—shall I read that?

Q. No, just simply read it, if it is your record made at that time, to refresh your recollection, and then tell me, were you notified, and on what date, that an excavation was ready for structure placing.

A. I was notified on the 15th that—

Q. Of what month?

A. Of April, 1944, that one structure hole was completed on April 14, 1944.

(Testimony of Fred Waltie.)

Q. Now, who told you that, if you know?

A. Mr. Staples.

Q. And he was who?

A. Superintendent for Macri and Company.

Q. What did you then do, if anything?

A. I went up and checked the hole.

Q. And what did you find?

A. Well, I found it wasn't excavated to the grades it should have been; that the walls were cut vertical.

Mr. Holman: Your Honor, I again move that the testimony of the witness with respect to what it should have been be stricken. In other words, let him tell what——

The Court: Well, that part will be stricken and disregarded. Just tell what it was. [721]

Q. Just describe the excavation as you saw it with reference to the banks and with reference to the grades.

A. Well, the banks I remember definitely were cut vertical, but the grades, I don't remember definitely whether they were up or down, but there was something.

Q. Do you recall whether or not they were worked on before the structures were put in place?

A. Yes, they were.

Q. And do you recall whether or not the Concrete Construction Company did the work, or Macri and Company did the work?

A. Macri Company had, or sent some of his crew to do more of the hand excavation, and after

(Testimony of Fred Waltie.)

they left there was still more to do, and that Concrete Construction Company's men had to do.

Q. Would you just relate what occurred between yourself and Macri Company with reference to the fine grading or hand grading, hand excavation in these excavations, the forepart of the job?

A. Well, we tried to work together on it and get things straightened out so there would be no trouble in the future, if that's what you meant.

Q. Well, you say you tried to work together. Just what did you do, Mr. Waltie?

A. Well, Mr. Staples was very busy with the shovel and didn't have time to take the fine graders, so I took them and [722] used them under my direction wherever possible, and also in a manner to teach them how to figure the elevations and to fine grade so that we wouldn't have any trouble.

Q. And you did that over how long a period of time? Just what experience did you have in that regard?

A. Well, it was actually the whole period that I was on the job, but I didn't have the men from Macri all that time; they were withdrawn and put on some other work, presumably.

Q. Did you have the same men to work with, of Macri's, each time, or not? A. No.

Q. Now, when did you first start setting structures in the excavations? You may refer to your records there to refresh your recollection if necessary.

A. Well, I think it was April 15; I'm not sure.

(Testimony of Fred Waltie.)

Q. Speak up, Mr. Waltie, when you're ready to answer. Structure forms, I'm talking about, not the concrete part of the structure.

A. That would be on April 17, may I change that? That was April 17 that it was completed. It was on April 15 that it was started.

Q. Is that the same day, then, that you were notified that the excavation was ready?

A. Yes.

Q. Now, how much time, on an average, if any, did your men, [723] your carpenters, spend in excavating in order to put in the structure forms?

A. You mean with reference to each hole, or as a whole?

Q. Well, any way that it should be answered, Mr. Waltie, if you give it to us by the whole, or on the average.

A. Well, on an average I'd say at least twice as long as it should have taken to construct the forms.

Q. Now, with reference to the time put in on excavation work itself by the carpenters, can you tell us what time was spent, if any, by the Concrete Construction Company in excavating or doing the fine grading in order to put in your structure forms?

A. Well, in one particular hole I remember there was more than eight hours of actual excavation time, and the excavating wasn't complete yet.

Q. Well, that's with reference to one excavation. How about the rest of them?

A. Well, there was a variance in the actual time, which I wouldn't quite remember.

(Testimony of Fred Waltie.)

Q. Were there any of them that did not require any excavation by the Concrete Construction Company? A. Not that I remember of.

Q. Now, did you during the fore-part of the job work right with Mr. Macri's men in making this fine grading? A. Yes. [724]

Q. And state what was the situation with reference to the ability of these men to read the structure layout plans and to make the excavation conform to those plans?

A. There was no one in the fine grading crew that had the ability to read plans and lay them out properly.

Q. Now, you went off of the job on what date, approximately?

A. On August 10 or 12 or somewhere in there.

Q. August 10 or 12 of what year? A. '44.

Q. And approximately how many structure forms had been built when you left?

A. I could tell, I imagine, by going back through these reports, but I don't actually remember for sure. It would be somewhere in the neighborhood of 75.

Q. That's all I wanted, was an approximation; and had there been, was there, some concrete poured while you were there? A. Yes.

Q. What was the situation with reference to the excavations ahead of you being ready when you were moving along with your structure form placement crew?

(Testimony of Fred Waltie.)

A. There was actually no improvement over what had been going on at the start.

Q. Did you make any complaints to anyone?

A. Yes.

Q. And to whom? [725] A. Mr. Staples.

Q. Now, you say there was no improvement. Just state what the situation was, Mr. Waltie.

A. Well, the holes were still cut with vertical banks, and the elevations, sub-elevations, were still off.

Q. And how did that affect your structure form placing operations?

A. Well, it affected the whole routine of the job. The form panels were laid out at the respective holes that were supposedly complete, and send carpenters to these holes, and they'd start assembling, and then find that the holes were off, and they would have to dis-assemble what they had already completed, and take it out, and go hunt up fine graders again. In many cases that caused considerable delay, because with the carpenters at that particular hole, I suppose that they were able to go right ahead and would leave them alone necessary for the time required to complete their work, and if something happened right off the bat, why, then they naturally sat there until I got back.

Q. Did you develop any system when the—or how did you know when the carpenters were delayed in putting in a structure?

A. After a few times of them sitting and waiting for me, without me realizing it, yes; that is, we designed a signal system. [726]

Q. What was it?

(Testimony of Fred Waltie.)

A. We'd just stick a 2 by 4 up in the air, with a white handkerchief. Whenever I had opportunity I'd look for that. Whenever there was one up I knew they were in distress, and I'd go back and help them.

Q. And what did you do then with reference to getting fine grading done by Macri and Company, when you'd find an excavation that was not proper as you've described it?

A. Well, I'd have to go and hunt up Mr. Staples and find out where his men, or any of the men that he had available, were, so I could go and get them and take them back to the excavation and have them finish the work.

Q. I don't believe we touched on this point at all, Mr. Waltie; about how far would it be from one of these structures to where the next one might be? I don't think that's been touched.

A. Oh, it varied. At a road crossing it's just the width of a road, a county road, to a thousand feet, approximately a thousand feet.

Q. And the terrain out there was entirely level, or not? A. No, it was fairly rough.

Q. Could you, standing at one station or excavation, at all times see the next one? A. No.

Q. Could you always see this white flag up on the 2 by 4? [727]

A. Well, if I made an effort to get to a point to see it, why, I could, eventually.

(Testimony of Fred Waltie.)

Q. Well, then, when you had to get Mr. Macri's fine graders to come back, where would they have to come from?

A. Well, they might be over miles away.

Q. How far away?

A. Miles; actually across country there it isn't so far, but when you have to take the road around, which there were very few of, why, it meant quite a little distance at times.

Q. And in order to get from where the carpenters were with a hole not ready, what would you do to them, specifically with reference to getting to the other——

Mr. Holman: I object to counsel's question. He's concluding elements that are based on assumption.

The Court: Overruled. Did you get the question? A. No, I didn't.

The Court: Well, let's start over again, and we'll ask another one.

Mr. Holman: I object to counsel, I know he doesn't intend to, but he certainly ought not to ask leading questions, and his question was suggestive, I thought.

The Court: All right, go ahead.

Mr. Waltie, you've testified about the white flag being up, which indicated that the carpenters were in distress? A. Yes. [728]

Q. Now, when you got back to that hole, and assuming that you then were going to get Mr. Macri's fine graders, now, what I want to know is

(Testimony of Fred Waltie.)

how did you go after them, where did you find them; did you walk there, or drive there, and how long would it take?

A. Well, I had to drive, naturally; it would take too long to walk.

Q. Well, tell the Court about it. That's the only way the Judge is going to know, Mr. Waltie, what you had to do, is to have you tell him what you did. How far you had to go.

A. Well, in some cases I didn't know where the fine graders could be found, so I would have to go and find Mr. Staples, which might be the upper end of the project, the other end, to find out where to locate his men.

Q. And what were your carpenters doing all this time?

A. Well, in rare instances we would have actually completed a hole so they could move ahead and move on to the next one, and then go back following completion of that hole, later on, but in most cases they just had to sit and wait.

Q. Well, when you got hold of Mr. Staples, then, if he was some other place on the project, what would take place then with reference to getting in touch with Macri and Company's fine graders, or his hand excavators? [729]

A. I don't quite understand that.

Q. Well, you've left the excavation, Mr. Waltie, where the white flag is. Now you said you had to go and find Mr. Staples, Macri's superintendent?

A. That's right.

(Testimony of Fred Waltie.)

Q. Now, I'm asking you, then, what did you do, if anything, with reference to getting in touch with the men who actually had to come back and do the digging, or did you quit when you notified Mr. Staples?

A. No, I'd have to go and get the men, wherever they were, in most cases.

Q. And then what did you do?

A. I'd take them back to the site, the particular excavation.

Q. Now, would you advise Mr. Staples, Mr. Macri's superintendent, of this situation?

Mr. Holman: Just a minute, your Honor, "this situation."

Q. With reference to the fine grading?

A. I beg pardon.

Q. Would you advise Mr. Staples, who was Macri's foreman, of the fine grading condition as you were finding it and as you prescribed?

A. Yes.

Q. And what would take place? What would he say, what would you say? [730]

A. Well, I'd ask him if we couldn't get it done faster, and he didn't have time to be on there with the fine graders, and he repeatedly asked me to take charge of them.

Mr. Holman: I move the answer be stricken. He asked what he said—I'll withdraw that.

Q. And what did you say, Mr. Waltie?

A. I told him I didn't have the time either.

(Testimony of Fred Waltie.)

Q. Now, did that same general situation exist throughout the time you were on the project as Schaefer's superintendent? A. Yes.

Q. Now, Mr. Waltie, do you recall about April 29 Mr. Schaefer being on the project with Mr. Macri and I believe Mr. Bill Schaefer and Mr. Staples, at which time a conversation took place with reference to Mr. Macri's method and condition of the excavating work? A. Yes.

Q. Would you just relate in your own words what took place at that time, that is, what was said, approximately where you were, and just follow it through? A. Well, at the time that——

Mr. Holman: First, when was that?

The Court: Do you want to fix the time?

Mr. Olson: I asked him on April 29, 1944; I started out my question with that.

The Court: Oh, I see; I didn't get that either.

Mr. Olson: I'm referring to April 29, 1944.

A. Well, at that time I was working on structure number 18, and Mr.—well, I was doing some hand excavating myself there, that is, with Mr. Schuler, who was a carpenter. Mr. Schaefer drove up and told me not to do any more hand excavating whatsoever.

Q. Was Mr. Macri there?

A. Yes, and there was nothing else to do in the field, there were no other holes ready, so I sent Mr. Schuler in——

Q. Who was Mr. Schuler?

A. He was a carpenter that worked on the Concrete Construction Company crew, and Mr. Schae-

(Testimony of Fred Waltie.)

fer asked me to go with them and check over some of the excavations, and explain why they were so difficult to put forms in, so we checked back over numerous structures; I've forgotten how many.

Q. Speak a little louder.

A. We checked back on numerous of the structure holes, and went over those that we had already placed, and showed Mr. Macri where they were impossible to work in.

Q. And just explain what you showed him.

A. Well, that the banks were cut vertical, that you couldn't, you didn't have room to hardly get your form in, let alone to get in there and work with it too, and that it was only natural that there would be dirt kicked down on the forms, and it would be impossible to strip them as they were [732] after the concrete had been poured.

Q. Go ahead with this meeting between Mr. Macri and Mr. Schaefer and the others. Tell what was said and where you went and what you did.

A. Well, we checked those holes, and Mr. Schaefer told Mr. Macri that he wasn't going to do any of the fine grading, and that the job was costing him far too much money to go ahead with it, and Mr. Macri told Mr. Schaefer not to worry about the cost, that he'd pay for all the extra cost and excess labor we'd been put to. Mr. Schaefer I believe made the remark that it wasn't only the time of excavation, it was the time lost in being held up so much.

Q. All right, now, what time was it when you

(Testimony of Fred Waltie.)

Q. What did Mr. Macri say, if anything?

A. Well, he said he'd take care of all the costs that we were put to.

Mr. Hawkins: Excuse me. This witness is going to testify as to an oral agreement, I take it, between the defendant Macri and the plaintiff Schaefer, and I object to the introduction of oral testimony varying the written contract. Now, the testimony so far shows that the fine grading, except, I think, very few minor instances, was actually done by Macri and Company, the testimony of Mr. Darcy, and in the second place, we have a written contract here; they're attempting to vary it by an oral agreement, an agreement which must be in writing [733] to be binding upon the parties. Now, it is true that there may be part performance, but my answer to that contention is that the performance which Concrete Construction Company actually did is just as consistent with the written contract itself as with any subsequent oral agreement, and therefore it cannot be relied on as part performance to take this oral agreement outside the statute of frauds.

Mr. Holman: I join in that, and that position that's been taken throughout.

The Court: It will be overruled.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you recall where you were in your relating of the conversation, Mr. Waltie?

(Testimony of Fred Waltie.)

A. We were out on the field at the very first part, somewhere along the first part of lateral 59.3.

Q. What I referred to, do you remember how far along in the course of the conversation you were when counsel made his objection? You had just said, I think, Mr. Waltie——

Mr. Holman: I object.

Mr. Olson: All right, Mr. Reporter, will you read the witness' answer?

(Whereupon, the reporter read the last previous answer, as follows: "Well, he said he'd take care of all the costs that we were put to.") [734]

Mr. Olson: Is that enough to orient yourself?

A. Yes, and then he said also that he would see that the job went ahead so that there would be no more waiting or no more digging by our men, that we could go right in and get things done the way it should be.

Q. Is that in substance the extent of the conversation, or was there more of it?

A. Well, I made some notes at that time, and if I may refer to those, I may be able to add to that.

Q. You may refresh your recollection.

The Court: You may refer to the notes to refresh your memory.

Q. Not to read them out loud, you understand, Mr. Waltie, but simply to refresh your recollection, if they are notes you made.

(Testimony of Fred Waltie.)

Mr. Hawkins: Are these notes you made at the time?

A. They were made very shortly after the meeting. It wasn't right at the meeting.

Mr. Holman: Made voluntarily, or under direction, Mr. Waltie? Did somebody direct you to make them, or not? A. No.

Mr. Olson: That's immaterial, if the Court please.

The Court: Well, he's answered it.

A. Well, Mr. Schaefer at that time told Mr. Macri that they'd have to be right and kept right, or that he was going to [735] pull off of the job, and so Mr. Macri told Mr. Staples then to go on with the work and to see that things were done properly, and for Mr. Schaefer to keep his crew there and keep them working.

The Court: It's time for mid-afternoon recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Waltie, directing your attention to the second conversation or meeting between Mr. Macri and Mr. Schaefer out on the field at 1062 on June 15, 1944, testified to by Mr. Schaefer, is

(Testimony of Fred Waltie.)

that sufficient to direct your attention to the meeting that I'm referring to? A. Yes.

Q. Were you present at that meeting?

A. Yes.

Q. And do you recall who else was there besides yourself, Mr. Macri, and Mr. Schaefer?

A. Mr. Al Hunter, and Mr. Cohen.

Q. Now, would you state the substance of the conversation that took place in Mr. Macri's presence and with Mr. Macri on that date?

A. Well, we again checked the structures——

Q. And also state what you did leading up to the conversation. [736]

A. Well, we checked the structure excavations for the benefit of Mr. Cohen, who was Macri's engineer, and to prove that they were excavated to—well, rather, just to prove that they were not right, and then I can't remember who said which first.

Q. Just give the substance of the conversation as best you can recall.

A. Well, Mr. Schaefer was insisting that he didn't want to go on with the job as it was being done then, that the costs were absolutely in excess of what they should have been, and the costs were very high then, and we hadn't got anything done, and he wanted to have the situation changed before we would come back on the job, and Mr. Macri said that he didn't have to worry about the extra cost, that he'd taken care of that, and that he would have an engineer on the job Monday who would see that things were done properly.

(Testimony of Fred Waltie.)

Q. Do you recall any conversation about the fine grading?

A. Well, Mr. Macri made the statement that two or three-tenths was nothing to be concerned about, that it didn't amount to anything, and Mr. Schaefer said that anything other than an absolute fine grade brought to concrete line, either on elevation or side lines, neat lines, was absolutely Mr. Macri's responsibility, and that he wanted nothing to do with it, and Mr. Macri said that he'd like to have [737] Mr. Schaefer take over the hand excavation, and Mr. Schaefer then again said that he absolutely wanted nothing to do with it, that it was not his responsibility, and Mr. Macri would have to see that it was done properly.

Q. Well, now, this two or three-tenths that you speak of, can you amplify what that means, or what it is?

A. Well, in most cases that two or three-tenths would actually be a couple of yards of earth to be taken out of the structure hole.

Q. Well, what I'm getting at, this two or three-tenths, what does it mean?

A. Well, it means that Mr. Schaefer should have allowed variation for that much.

Q. How much is two or three-tenths? Two or three-tenths of what?

A. Of a foot.

The Court: I thought you meant inch. What was the date of this, by the way? I don't think I got that.

(Testimony of Fred Waltie.)

Q. June 15. Was there any structures stripped while you were there? A. Yes.

Q. Forms removed out of the excavations?

A. Yes, there were, but I actually wasn't there when they were stripped.

Q. I see. What was the situation with reference to lateral [738] clearance between your outside form of your structure panel and the bank of the excavation?

A. Well, it was so close as to be almost impossible to get structures in without a lot of hand digging by the carpenters when they got there.

Q. Well, was there hand digging on the banks to get your structures in? A. Oh, yes.

Q. Can you amplify the nature of any of the digging you had to do with reference to lateral clearance in putting in your structure forms?

A. Well, yes; we had to widen it out; in some cases the elevations were wrong, that is, we had to either bring them back or excavate to lower them, and we were usually not laterally extended far enough.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Waltie, you said you were with the Oregon State Highway Department? A. Yes, sir.

Q. In what capacity?

A. As a bridge construction man.

Q. Bridge construction engineer?

A. I didn't say engineer.

(Testimony of Fred Waltie.)

Q. Bridge construction—under Mr. Baldock?

A. Yes, indirectly.

Q. Are you a graduate engineer, Mr. Waltie?

A. No.

Q. Where is your residence?

A. Prineville, Oregon.

Q. Were you subpoenaed to come here?

A. No.

Q. Was arrangement made with the Oregon State Highway Department you could be absent for the purpose of attending?

A. Yes, but not to Mr. Baldock.

Q. Not to Mr. Baldock; it would be your superior?

A. Yes, sir.

Q. Who is that since Mr. McCullough's death?

Mr. Olson: If the Court please, I don't see the materiality of going into this.

Mr. Holman: Strike.

The Court: Sustained.

Q. You say you went on in April, 1944, on this job?

A. Yes, along there somewhere.

Q. Then if the entry on the Concrete Construction Company payroll shows you present for the week of March 23 to March 29, would that be incorrect?

A. No, it wouldn't have to be incorrect.

Q. Oh, were you giving only an approximate time, Mr. Waltie?

A. That's right. [740]

(Testimony of Fred Waltie.)

Q. Then it was a fact, was it not, that you stayed on for eight weeks and then you were absent for six weeks, about six weeks?

A. Yes.

Q. I'm referring from about the 18th of May to the 22nd of June, you were not on the job?

A. If the records show that, that would be the case.

Q. Would you like to check the payroll to find out?

A. No, because I wouldn't remember the dates anyway.

Q. I understood you to say that from the time you went on until the time you left this job, you were on it continuously. You may not have said that. Did you? A. No, I didn't.

Q. All right, sir. Then there was at least one period in there of some time that you were not on the job?

A. I was actively in charge of the job, but we weren't there.

Q. Where were you during that period I spoke about? A. In Portland.

Q. In Portland with whom?

A. With the construction company that I worked for.

Q. Yes; with this same company? A. Yes.

Q. On some other job?

A. On some other work, yes.

Q. What other job? [741]

A. That I couldn't say, sir.

Q. Sir? A. I couldn't say.

(Testimony of Fred Waltie.)

Q. You mean you can't say, or you don't remember? A. Well, I don't remember.

Q. I see; and that is correct, is it, Mr. Waltie, that until just a week before July 4 from mid-May you were off of this job?

A. If the records show that, that would be right.

Q. That's your best recollection, that you were?

A. Yes, there was a period that I was off.

Q. Now, when you came back in June, the latter end of June, were you replaced by Mr. Darcy?

A. No.

Q. Mr. Darcy came right after the 4th of July, didn't he?

A. I don't remember the exact date.

Q. I see; and were you rated as a carpenter foreman and drew a carpenter foreman's pay, Mr. Waltie? A. Well, no.

Q. You were not?

A. No; the reports show that I'm a carpenter foreman, but then I had a reason for using that, of my own.

Q. Well, I'm interested, in view of the payroll, which shows you as a carpenter foreman, does it not? A. Yes. [742]

Q. Well, why?

A. Well, it was my first job as a superintendent, and I just didn't feel qualified to call myself that at the time.

(Testimony of Fred Waltie.)

Q. Yes, sir; in other words, you didn't want to assume the title of superintendent? A. Yes.

Q. And that was your first job in connection with structure excavation? A. No.

Q. Sir?

A. Well, with that particular type of structure excavation, yes.

Q. Yes, I mean of this type of construction.

A. Yes.

Q. May I ask you, Mr. Waltie, if Exhibit 25, about which you testified on direct, is a fair sample of an average ordinary structure excavation on 1062, schedule 1? A. As an average, yes.

Q. In other words, it is your statement that most of the excavations on 1062-1 have the two or three depths as shown by that model?

A. You mean that that is the average of the structures?

Q. Yes, is this a fair representation of the average structure?

A. Yes; there are some larger and some smaller, if that's [743] what you mean.

Q. That is correct, sir, but isn't this in fact a road crossing structure?

A. Well, it is a delivery; two deliveries, in fact.

Q. Yes, sir, but this particular 25 is a road crossing structure? A. Not necessarily, no.

Q. Don't you know where 25 was made from?

A. No.

Q. You've never been told?

A. I've never been on that particular part of the site.

(Testimony of Fred Waltie.)

Q. You don't know that that is for a certain structure? A. Pardon.

Q. You don't know that that is made as a replica of a certain structure?

A. Well, if it were made to scale it would have to be.

Q. Mr. Waltie, were you not present when that was identified and explained by Mr. Darcy?

A. Yes.

Q. Didn't you hear him explain what it was?

A. Yes, I think so.

Q. Now, isn't it a fact that before you took the stand you consulted with counsel and Mr. Darcy with respect to this structure, and understood that it represented a certain structure? [744]

A. Only as an example; not as a structure.

Q. Then it is your understanding that that is not any actual reproduction of an actual structure?

A. No, I didn't say that.

Q. Well, what is your understanding?

A. It's not an example of any structure that I worked on. What I mean is that this here has the floor elevations complete, in order for that structure to sit in there, and the assemblies I testified to, referred to, in the field, those floor elevations were not right according to the plan.

Mr. Holman: I move that be stricken as not a responsive answer, that latter portion.

Mr. Olson: I object, your Honor.

The Court: Let's read it over.

(Whereupon, the reporter read the last question and answer.)

(Testimony of Fred Waltie.)

Mr. Holman: That's the same part that I object to, your Honor, the last portion of the witness' testimony.

The Court: Well, I'll deny the motion. You asked for his understanding and explanation of it.

Q. Would you please step over to that 25, Mr. Waltie? Calling your attention to what is marked 25c and d—— A. These two, yes.

Q. ——will you tell me whether or not in excavations as [745] encountered by you when you went to put in the structure you found those at times excavated and covered with planks so that they would not be caved in? A. No.

Q. Never did? A. No.

Q. Now, would you tell me whether or not on any occasion the bank shown as 25g—what do you call this? A. Oh, it would be a fillet.

Q. Fillet, shown by 25g, connected with 25h, was ever broken down after it had been fine graded, broken down by your carpenters after it had been fine graded? A. No.

Q. Never? A. Never.

Q. Nor 25e nor g nor f?

A. There is a point that I'd have to make clear before I could answer the question properly.

Q. Well, make it clear, sir.

A. The fact that these had never been cut would allow for breakage; it should have been cut this way, which would exclude any chance of breaking it.

Q. Well, didn't you tell on your direct that 25g and 25f were never cut and you always had to do it? A. I would say never. [746]

(Testimony of Fred Waltie.)

Q. You would say that that was your testimony on direct? A. Yes.

Q. So that if they were cut wrong, it was your operation in cutting them wrong, wasn't it, so they would break?

Mr. Olson: I submit that hasn't been his testimony in any regard at all.

Q. Didn't you say that they were cut too sharp and they would break?

A. Well, they were cut too sharp, instead of being cut this way. This way they naturally won't break.

Q. Now, you say that there was no single occasion where the operations by the Concrete Construction Company broke or shoved down wall 25b?

A. Well, you understand that I wasn't actually on every structure hole from the time the carpenters started to work until it was completed. That would be impossible for me to swear that they were all that way.

Q. Well, I want you to be just as much on them as you were on direct examination, and answer my question, Mr. Waltie.

Mr. Olson: I submit the witness has answered, to the best of his ability.

The Court: I think the question is objectionable. He said he wasn't there all the time, and couldn't answer.

Q. Then how could you tell me those were never cut if you weren't there all the time? [747]

(Testimony of Fred Waltie.)

A. Because I inspected the holes before the carpenters got there.

Q. Yes, sir; and now, this wall represented by 25a and 25b is of variable depths with respect to the different structures, isn't it? A. Yes.

Q. Yes. It might be as much as a foot or so, instead of a considerable depth?

A. That's right.

Q. Do you know what this one is, as shown in the model? A. No.

Q. And there are all types of change of grade in those structures, aren't there? A. Yes.

Q. Yes. Many of the structures are considerably out of the ground upon completion, aren't they—above the ground? A. In some cases.

Q. I'm talking now about the completed structure, Mr. Waltie? A. Yes.

Q. Some of them would be partly in the ground and partly out? A. Yes.

Q. And some of them would be even with the ground, or below the ground?

A. That is, you're speaking of the top elevation?

Q. The completed structure. [748]

A. Well, I mean the top elevation?

Q. Yes, right. A. Right.

Q. Now, if you'll step back over there. I believe you said on direct examination with reference to structure exhibit 25 that where the bank indicated as 25a and b was broken down, it was necessary to crib?

(Testimony of Fred Waltie.)

A. I didn't say broken down. I said either cut too far or not far enough.

Q. O.K. I thought you said broken down.

A. No.

Q. Anyway, where it was not flush with the neat line of the structure? A. That's right.

Q. Now, then, if a crib were put in, would that be a carpenter operation, or would the frame of the structure be used as the crib?

A. There is absolutely no rule that covers putting that in.

Q. In practice, in your practice, Mr. Waltie, was the frame of the structure the crib? Do you understand what I mean? A. Yes.

Q. Well, was that so, or not?

A. That was used as a face for the concrete; is that what you said?

Q. No. Would that be used as the crib? [749]

A. Well, you asked me if I put in a crib, that would be used as a crib?

Q. Yes, sir. A. Well, that is obvious.

Q. It would be the frame of the structure itself, and then behind that you said that you put earth?

A. Yes.

Q. And that was supposed to be compacted, but you didn't compact it?

A. No, because the Maeri men were supposed to do that.

Q. Sir? A. The Maeri men did that.

Q. The Maeri men did that, so it was compacted to your knowledge, was it not?

(Testimony of Fred Waltie.)

Mr. Olson: I'm getting confused myself.

The Court: I may be confused here, but I thought he was testifying about these cribs with reference to one of these vertical walls that was out of line. If it weren't out of line there wouldn't be any frame of the structure at all, there wouldn't be any form; the concrete would be poured against the line.

Mr. Holman: That's right; now I've asked him when he puts the crib in if it isn't the wall of the structure, the frame, the outside frame.

The Court: There is no frame there. [750]

Mr. Holman: He said he has to put a frame in to crib it. I'm asking if the frame of the structure doesn't form the crib. Is that right, or not?

Witness: No, it is not.

The Court: You asked him if the frame weren't used as the crib, isn't that what you asked?

Mr. Holman: Yes.

The Court: Well, that's confusing, and there wouldn't be any frame.

Mr. Holman: I think the confusion is this; the witness has said where this 25b is off, he has to put a crib in.

The Court: That's right.

Mr. Holman: And then throw dirt behind there. What I asked is when he put a crib in, if that didn't become the frame of the structure. He said it did.

The Court: I didn't understand you to say that.

Mr. Holman: He did.

Witness: Well, I didn't answer to that.

(Testimony of Fred Waltie.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. What I would like to know is, where you put a crib in, do you pour with concrete up against the crib?

A. Well, in the first place the crib is illegal.

Mr. Holman: Well, I move that be stricken, your Honor. [751]

The Court: That will be stricken. That isn't responsive.

Mr. Holman: Will you read the question, Mr. Reporter?

(Whereupon, the reporter read the last previous question.)

A. Well, we did, yes.

Q. That's what I want to know. Then instead of the earth, there would be a board structure there, right?

A. Yes.

Q. All right, now we're getting where I want. Then was that lined with veneer?

A. No.

Q. It would be just the shiplap boards without the veneer; that was done under your direction?

A. Yes.

Q. Was that called to the attention of the engineer, the government engineer?

A. Yes.

Q. What do you mean, then, by saying it was illegal?

A. Well, it took—well, an act of kindness of the engineer to allow it to be poured that way.

(Testimony of Fred Waltie.)

Q. I'm referring you to Macri's Exhibit 13a of the date of April 14, 1944. Now, you were on the job then, were you not? [752] A. Yes.

Q. I mean April 18, Macri's 13b, April 18, 1944; and under the remarks you say this: "Const. installing forms at lateral 59.3." A. Yes.

Q. That is in April, April 18. Is that correct, to the best of your memory?

A. Yes, it would be the best I remember. I don't actually know.

Q. Yes, sir. Can you tell me how many forms were installed in April? A. No.

Mr. Holman: Your Honor, I would like at this time to request that 13a, b and c be substituted for the engineer's copies, or maybe I had better hold it for all of them, your Honor.

The Court: Well, what is the necessity for taking them out at this stage of the trial?

Mr. Holman: None, except I understood your Honor's instruction was that we would have copies made and substituted.

The Court: Yes, that may be substituted, if counsel has no objection.

Mr. Olson: We have no objection. I think the original form should stay here. [753]

The Court: That's what I had in mind, unless there is some reason for taking it out. I think it would be better to make the substitution at the end of the trial.

Mr. Holman: Very well.

(Testimony of Fred Waltie.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, does April 18, as to the time that the forms were being set there, as called to your attention by Macri's 13b, refresh your recollection as to whether or not forms were on the ground when you came? A. Do you mean that the——

Q. Forms were in the excavations, yes, sir.

A. When I came where?

Q. Came on to the job, sir.

A. No, they were not in excavations when I came on to the job.

Q. And would you say that April 18 was the first time that any forms were set by the Concrete Construction Company?

A. If the reports that I made show that, yes.

Mr. Olson: I think he said, counsel, that he finished the first one on the 18th, and started the 15th.

Q. I am directing your attention particularly to your direct testimony that the forms were reported to you as ready to be set—pardon me—the excavation was ready to receive the form on April 15.

A. That's what the record shows, yes.

Q. Now, then, does it mean that before April 15 there were no forms set? A. Yes.

Q. Then had there been forms built in the yard at that time, Mr. Waltie? A. Yes.

(Testimony of Fred Waltie.)

Q. How many, about?

A. Well, I don't recall the exact amount. I remember our goal was 75 or 80, and we were unable to complete the ones that we had planned.

Q. I was asking about forms in the yard; I wasn't asking about holes at all.

A. I was referring to the forms in the yard. They are made completely in the yard.

Q. They are made in panels, are they not, and then assembled? A. Yes.

Q. So when you spoke of your carpenters building forms in the field, you meant assembling the panels? A. That's right.

Q. They built no forms in the field?

A. No, they're just assembled.

Q. Can you tell me what structures were set, were accommodated by forms on April 17, by you?

A. 1, 2, and 3. [755]

Q. Forms 1, 2 and 3. Now, would that be numbering forward on the stationing? Were you going forward on the stationing, or backward on the stationing?

A. It would be the beginning, yes.

Q. It would be forward on the stations, sir?

A. Yes.

Q. There wasn't any concrete poured until August, was there, Mr. Waltie? A. No.

Q. Now, isn't it a fact that when the actual operation of concrete pouring commenced you were replaced as superintendent? A. Yes.

Q. By Mr. Darcy? A. Yes.

(Testimony of Fred Waltie.)

Q. Or by Mr. William Schaefer, which?

A. Mr. William Schaefer was up there because I had asked for relief, and he was supervising the replacing of someone in my place.

Mr. Olson: You had asked for what?

Q. Relief; in other words, you mean you wanted to leave the job? A. Yes, sir.

Q. You wanted to leave the job, did you not, because you felt that you were not qualified as a concrete man? [756] A. No.

Q. Or didn't you? A. No, sir.

Q. I see; it was some personal reason, then, was it, Mr. Waltie? A. Yes.

Q. How much concrete had been poured before you left the job? A. That I couldn't say.

Q. I mean with respect to structures?

A. I wouldn't know.

Q. Have you a record?

A. There is a record, yes.

Q. Can you consult a record? A. Yes.

Q. Will it require computation, Mr. Waltie?

A. Yes, it would.

Q. Well, then, I'll pass the question.

A. O.K., thank you.

The Court: I don't know that I understand, here. Was this question how much concrete had been poured before he left?

Mr. Holman: Yes, your Honor.

The Court: I thought he said he left when the concrete pouring started.

(Testimony of Fred Waltie.)

Mr. Holman: No, he left on August 12, and there [757] had been concrete poured before he left. I wanted to get the concrete poured.

The Court: I'm not trying to comment on the evidence. I just wanted to get it straight. I thought he said he was relieved from the job as soon as the concrete pouring started, but there must have been some poured before that.

Witness: I think that was the 1st; I was relieved of the concrete pouring before it started, actually.

The Court: Well, how could there have been some poured before he left?

A. I was there after the relief man took over.

Q. After you had severed your connections with the Concrete Construction Company?

A. Well, they were severed completely, I think it was on the 10th of August.

Q. Mr. Waltie, regardless of the question of whose function it was, as an economic proposition in field operation would it have been less expensive for you and any of your carpenters or helpers you had to take the shovel and the mattock and fine grade a structure, than for you to go after Mr. Staples and his crew and bring them back?

Mr. Olson: Now, if the Court please, I object to that question as not being proper cross-examination. In the first place, I didn't ask him on expense, but certainly, [758] your Honor, it is an improper question, because there was no obligation upon the Concrete Construction Company to do ex-

(Testimony of Fred Waltie.)

cavation. And it turned out, it may have been cheaper if we had done this whole work ourselves, rather than to insist that Mr. Macri do his part of the contract.

The Court: Well, I'll sustain the objection. I think it is immaterial what was the most economical method.

Q. Would it not have been practicable, Mr. Waltie, for you to have done the fine grading on the structure and kept an account, and made a claim against Macri under the sub-contract?

Mr. Olson: That's objected to as being immaterial——

Mr. Holman: I have in mind the position under the sub-contract.

Mr. Olson: ——and further, that there was no obligation upon the Concrete Construction Company to do fine grading.

The Court: I'll sustain the objection.

Q. Would you please tell me who was present at the meeting you say occurred on April 29, 1944, when Mr. Macri was there?

A. Mr. Macri and Mr. Staples, Mr. M. C. Schaefer, Mr. W. E. Schaefer, and myself.

Q. And you say you were working at that time on structure 18? [759] A. Yes.

Q. What were you doing? What was your operation on structure 18?

A. May I withdraw that?

Q. Yes, sir.

A. I'm not too sure that I was on 18; maybe I did, maybe I didn't.

(Testimony of Fred Waltie.)

Q. You told counsel it was structure 18?

A. Yes, I perhaps did.

Q. You're not sure now, sir? A. No.

Q. Very well, sir. Now, on that occasion, you said in your direct testimony, "We checked back on numerous structure holes." Who is "we"? Who did the actual checking, I mean the measuring and checking? A. Mr. Staples and myself.

Q. Mr. Staples and you.

The Court: You'll have to hurry this up a little, Mr. Holman. You're taking too much time entirely.

Mr. Holman: That's all, your Honor.

The Court: Any questions?

Cross-Examination

By Mr. Hawkins:

Q. Did you install any structures such as is evidenced by exhibit 25 and 26?

A. Well, yes, as close as they come to that. They're all the [760] same type, and yet they have variations.

Q. I see, and in each of those instances you had a neat concrete wall up against bare dirt?

A. On that particular type structure, yes.

Q. Then the character of the dirt out there is such that you can use the dirt as one wall, is that right? A. If it is not too high.

Q. If it is not too high. What is the average depth of these excavations?

A. I don't remember that.

(Testimony of Fred Waltie.)

Q. Around six feet?

A. You were speaking of that cut, now, or the actual depth of the hole?

Q. The depth of the hole, measured with reference to the surrounding terrain.

A. It would be hard for me to say the average, because that was only a small portion of the job.

Q. Well, it would vary from three to six feet?

A. Presumably.

Q. I beg pardon?

A. I really don't know.

Q. Well, how many excavations were you in, in this area?

A. Up to about 75.

Q. About 75?

A. That doesn't mean 75 holes, though. [761]

Q. Well, how many holes were you in, then?

A. That I couldn't actually say.

Q. Approximately 50?

A. Could be that.

Q. And you cannot say on the average how deep they were?

A. Well, if you wish an actual average I can't, no.

Q. Well, just your best estimate.

A. Oh, I'd say four feet.

Q. About four feet; and in each one of these holes the excavation was at least one foot from the neat line of the concrete wall, from the outside?

A. You asked if it was?

Q. Yes. A. No.

Q. It was not; it was less than that?

A. Yes.

(Testimony of Fred Waltie.)

Q. Did you do any of the rough excavating?

A. Partially, or directing it.

Q. You or any of your crew? A. Yes.

Q. Of the rough excavating? A. Yes.

Q. And what instruments did you use for that purpose? A. Picks and shovels.

Q. Picks and shovels. In addition, you did fine grading, is [762] that right? A. Yes.

Q. Now, with reference to this meeting that took place on the 29th of April, 1944, at which you were present, do I understand your direct testimony correctly that Mr. Macri agreed to pay the Concrete Construction Company, that is, Mr. Schaefer, for the fine grading that you were to do in the future?

A. That was the way he said it, yes.

Q. I see, and do I understand you correctly that Mr. Schaefer said that he would not take over the fine grading? A. Yes.

Q. Do I understand you correctly that Mr. Macri agreed to do all of the work in connection with the fine grading? A. Yes.

Q. Then in other words, Mr. Macri not only was to do all of the work on the fine grading, but was to pay the Concrete Construction Company for doing the same thing?

A. Well, the result of the meeting was established that we were to do none of the fine grading, and that he was to do it all.

Q. Oh, I see; in other words, then, the situation remained as it was before; Macri was to do the

(Testimony of Fred Waltie.)

excavating, and you folks were to prepare the structures and install them in the excavations? [763]

A. Yes.

Q. And pour the concrete?

A. That's right.

Mr. Hawkins: I think that's all.

Mr. Holman: May I ask the witness another question, your Honor?

The Court: Yes, all right.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you make up any statement of cost for any of the fine grading or the excavation that you did?

A. I made a time report, but not a cost report.

Q. Yes, sir, so you never, as superintendent, detailed to Mr. Macri's superintendent any bill for anything you did?

A. Not a bill, no.

Q. All right, sir, and that was never done to your knowledge?

A. I detailed hours, but not the actual cost.

Q. You detailed the hours to whom?

A. Mr. Staples.

Q. You detailed the hours to Staples, expended by your men?

A. Yes, I detailed them to him to have him sign them so I could send them to our office. I never could get him to sign them, though.

(Testimony of Fred Waltie.)

Q. In other words, you wanted his signature on them so you could send them to your office?

A. So that they could be presented. [764]

Q. Did you give Staples anything to send to Macri's office?

A. No, that would have been automatic, but he wouldn't sign them.

Q. Did you give Staples anything to send to Macri's office?

A. No, not without we had the same copy.

Cross-Examination

By Mr. Ivy:

Q. Mr. Waltie, those statements that you tendered Mr. Staples for signature, did they set out the work that you and your crew had been doing for Mr. Macri?

A. That is, the excavation work, yes, the extra time taken on each structure.

Mr. Ivy: That's all.

Redirect Examination

By Mr. Olson:

Q. Mr. Waltie, counsel referred to the payroll as showing you having been off the job for five weeks. Would you explain that, what took place, and why?

A. Well, Mr. Schaefer, after they had so many meetings and consultations, and work still didn't go on, why, Mr. Schaefer told me to take the men off the job until things were straightened out.

(Testimony of Fred Waltie.)

Q. And do you know when you took the men off the job? A. Not the exact date, no.

Q. Were there any holes excavated and fine graded in accordance with the specifications and ready to receive concrete structure forms? [765]

A. No.

Q. When you pulled them off the job?

Mr. Holman: Just a minute. I object to that question, your Honor. He can ask the witness if they were fine graded, but he can't put in the witness' judgment the matter of plans and specifications.

The Court: I'll overrule the objection. He was working with the plans and specifications.

Q. Would you answer the question, Mr. Waltie?

A. Yes. I've forgotten what the question was, now. I have it now, if there were any holes ready for forms?

Q. That's the substance of it.

A. And I said no.

Q. Now, before taking this job as superintendent, Mr. Waltie, had you had previous experience in concrete construction work? A. Yes.

Q. And would you relate what previous experience you had?

A. Well, I worked for the Concrete Construction Company previous to that time, about three years, and had been in construction work for years before that; in fact, since I got out of school.

Q. And how long had you been in construction work before going on this job?

A. Oh, at least 12 or 15 years. [766]

(Testimony of Fred Waltie.)

Q. And did that work deal with concrete construction? A. Not entirely, no.

Q. Did it partly deal with concrete construction?

A. Yes, at times.

The Court: Is that all?

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: No, your Honor.

The Court: Do you have any further?

Recross-Examination

By Mr. Hawkins:

Q. Mr. Waltie, in all of your experience in construction work have you ever seen an excavation such as evidenced by exhibit 23? That is the ideal excavation over there.

Mr. Olson: I think that is objectionable, your Honor, as being immaterial, if he's ever seen one.

The Court: Well, I'll overrule the objection. I think I see what is intended. Go ahead.

A. No.

Mr. Hawkins: That's all.

The Court: Anybody else have any questions? It is understood, then, that this witness may be excused from further attendance on the Court.

(Whereupon, there being no further questions, the witness was excused.) [767]

(Whereupon, the Court took a recess in this cause until Monday, March 3, 1947, at 10 o'clock a.m.)

Yakima, Washington, Monday, March 3, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

THEODORE GALLOWA

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Theodore Gallowa.

Q. You live where? A. Portland, Oregon.

Q. By whom are you now employed?

A. Alford's Automotive.

Q. Do you at the present time have any connection with the Concrete Construction Company?

A. I do not.

Q. During 1944 were you employed by the Concrete Construction Company in connection with Roza Project 1062? [768]

A. I was.

Q. And in what capacity?

A. Mixer operator.

Q. That's concrete mixer operator?

A. Yes, sir.

Q. Approximately what time did you commence work on that project? A. July 31.

Q. And do you know how long you were on the project? A. Yes, sir.

Q. Until when?

A. November, I believe the 21st.

(Testimony of Theodore Gallowa.)

Q. Those dates both are in 1944?

A. Yes, sir.

Q. Now, were you on the first concrete pour, then? A. I was.

Q. Did you have an opportunity, Mr. Gallowa, and did you examine or notice the excavations that were made in connection with 1062?

A. Yes, I did.

Q. Did you see the excavations before or after there were panels or forms placed in them?

A. Both.

Q. And would you just explain in a general way thoses excavations? [769]

A. Before the panels, or before the structures were in, the walls were vertical, and at one time I had the opportunity of noticing the carpenters doing excavating in the hole that they were going to put a structure in. What the excavation was I do not know, but they were in there with shovels and digging, and we were pouring a structure right close to them, and I noticed there that the walls were also vertical. There was not much space between the wall and the strong-backs, I should judge consisting of—well, right up against the wall at the bottom to maybe 8 or 10 inch clearance at the top.

Q. Now, approximately how much distance would there be between those various stations or structures, Mr. Gallowa?

A. Well, I should judge, pouring road crossings would be right across the road, consisting maybe of forty or sixty feet, to a quarter of a mile, up to half a mile.

(Testimony of Theodore Gallowa.)

Q. Now, when you came to a structure to pour it, ordinarily would the carpenters still be working there, or would they be away?

A. Very seldom that we poured or were ready to pour a structure that the carpenters were working in. We would always see to it that we were busy doing something else besides pouring structures if we were caught up.

Q. Now, during this period of time from July to November were you helping to pour each structure? [770]

A. Yes.

Q. In other words, your concrete crew worked as an entity on a structure until it was done, and went to the next one?

A. That's right.

Q. So that you had an opportunity to observe each of these structures during that time?

A. I did.

Q. Well, now, you have explained, then, some of the structures with reference to lateral clearance, Mr. Gallowa. State whether or not that was a general, typical situation with reference to each structure?

A. It was.

Q. Did you see any of the excavations where the bank had been cut into in order to accommodate the strong-backs on the panels?

A. I sure did.

Q. What was the situation with reference to whether or not your concrete crew was able to pour and work continuously?

A. We were not able to pour continuously at any time.

(Testimony of Theodore Gallowa.)

Q. And why not, Mr. Gallowa?

A. There were no structures ready.

Q. Would you say, then, that your concrete crew was working to capacity, or not?

A. How was that? [771]

Q. Was your concrete pouring crew working to capacity on the job? A. No.

Q. Were you ever sent to do other types of work? A. Yes.

Q. And explain about that to the Court.

A. Well, when we were caught up with the pouring of structures we would then, the foreman and I, my foreman and I, we would then start taking care of the equipment, and when we were caught up with that there was twice that we built bridges, just to have something to do, to keep our men, some of our men, occupied. When we were caught up with that, why, we went out and checked up with Mr. Darcy, and he himself told us that there wouldn't be any pouring for quite some time because of being caught up with the carpenters, and we would be sent back to Portland for work in there.

Q. So that at times you were sent from this job back to Portland? A. Yes.

Q. Now, what was the situation, if you know, Mr. Gallowa, as to whether or not the carpenters, on the occasions that you would have an opportunity to see them, were up with or were not up with Mr. Macri's excavators, fine graders? [772]

A. Yes, they were many a time caught up with Macri's excavation.

(Testimony of Theodore Gallowa.)

Q. Did you ever help remove any of the forms, or did you see it done? A. No.

Q. Did you see any of them removed?

A. Yes.

Q. Can you explain what you saw or observed in the matter of removing form panels?

A. Well, in the matter of removing the panels, they had to do quite a bit of prying with two by fours and bars, and digging, to get the forms out.

Q. You say they done digging?

A. Oh, yes, they had to do digging to get the forms out.

Q. Did you see that, Mr. Gallowa?

A. Yes, and I noticed that one structure especially, that the panels were pretty well torn up by getting them out away from the structure.

Q. Now, would that be just an occasional situation, or general, or typical?

A. General; that was a general situation.

Q. Now, there's been some observation made about whether or not Mr. Schaefer had what is called a transit mixer on this project.

Mr. Holman: I object to the form of the question, [773] your Honor. I think it is leading.

Mr. Olson: It isn't a question so far.

The Court: Well, you may ask him about the equipment. I think you object to his assuming what was testified?

Mr. Holman: Yes, what's been testified here.

The Court: I'll sustain the objection to the form of the question.

(Testimony of Theodore Gallowa.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Did Mr. Schaefer have on the job what is commonly called a transit mixer? A. No.

Q. And have you worked in the concrete business for some time, Mr. Gallowa? A. I have.

Q. Are you familiar with concrete pouring operations? A. Yes, sir.

Q. Have you worked with these transit mixers?

A. I haven't worked with—I have worked at jobs with them, but never did operate one.

Q. Never did operate it; can you tell us whether or not on the terrain out there it would have been possible to have operated a transit mixer?

A. Not as satisfactory as our operation was.

Q. Why? [774]

A. They are too heavy, much heavier loaded than our mixer was, the way we transferred it.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Gallowa, you were not, then, concrete foreman? A. No, sir.

Q. What was your designation?

A. Concrete mixer operator.

Q. Concrete mixer operator; in other words, you would be shown on the payroll as an operator?

A. I believe so.

(Testimony of Theodore Gallowa.)

Q. How long had you worked for Mr. Schaefer before you came to this job 1062?

A. One year.

Q. And what had you been doing?

A. Well, helped with the work down at Portland, consisting of concrete pouring, operating the mixer down there.

Q. Same mixer? A. No.

Q. Same type?

A. Yes, and building forms.

Q. Then in your union affiliations were you affiliated as a carpenter or as a trucker or concrete pourer, or what?

Mr. Olson: Objected to as being wholly immaterial, if the Court please. [775]

The Court: Sustained.

Q. You were, then, subject to direction as to where you might work at any time, from Mr. Schaefer, whether at Portland, or here, or elsewhere?

A. By Mr. Darcy.

Q. By Darcy? A. Yes, sir.

Q. Was Darcy in charge of the Portland operations, too? A. No.

Q. Well, were you working under Mr. Darcy in Portland?

A. Oh, no, not in Portland; I'm sorry.

Q. Yes, sir.

A. No, I was under a different foreman down there.

Q. Yes, and subject to the direction of Mr. M. C. Schaefer, Matt Schaefer, or Will Schaefer, weren't you? A. That's right.

(Testimony of Theodore Gallowa.)

Q. And when you were told to come to 1062, this job, you hadn't been there previously at all?

A. At 1062?

Q. Yes. A. No.

Q. Had you been told that a number of forms had been in the ground for a long time, and been weathered or cracked? A. No, sir.

Q. You poured the concrete that was poured at all? [776] A. I did.

Q. And that was as late as July 31, 1944?

A. That's right.

Q. Could you tell by looking at the forms whether or not there had been some of them which had been in there for a long while?

A. I didn't pay any attention to that.

Q. You didn't pay any attention to the forms that you poured concrete in, sir?

A. Not as to how long they had been in, no.

Q. Not as to tightness? A. Oh, yes.

Q. As to cracks? A. Yes.

Q. As to warping? A. No.

Q. You didn't pay any attention to that at all, sir; and the excavations which you were telling counsel about, then, were excavations which had been made but had not yet been filled with forms, is that correct?

A. I can't understand that, sir.

Q. What is it you can't understand, Mr. Gallowa? A. I don't understand the question.

Mr. Holman: Will you read the question?

(Testimony of Theodore Gallowa.)

(Whereupon, the reporter read the last previous [777] question, as follows: "Q. You didn't pay any attention to that at all, sir; and the excavations which you were telling counsel about, then, were excavations which had been made but had not yet been filled with forms, is that correct?")

A. Yes.

Q. They were excavations which were being currently made while you were there?

A. Some of them.

Q. Most of them? A. Yes.

Q. Yes, sir; and most of those which had been made before you were there were filled with forms, were they not? A. That I couldn't say.

Q. What is your best recollection on that, sir?

A. I didn't have the opportunity to go around so much as some of them had. I was with the equipment, and the only work that I saw was if it was close to the mixer, or the operation.

Q. Well, Mr. Gallowa, if you began pouring concrete into the forms and continued until November 21, 1944, you certainly poured most of the concrete in the forms that were built, didn't you?

A. Yes.

Q. They had already been built some time before your pouring, [778] hadn't they?

A. Some of them.

Q. Now, is it one of those forms that you saw this particular place you told counsel, where it was

(Testimony of Theodore Gallowa.)

absolutely tight at the bottom and 10 inches out at the top? A. Most of them.

Q. Most of them; can you give me any one section? Did you make any note? A. No.

Q. Who was your concrete foreman?

A. Mr. Jack Holmes.

Q. Jack who? A. Holmes.

Q. Did you report it to him?

A. He was right there.

Q. I asked you, sir, if you reported it to him?

A. We talked about it, amongst ourselves.

Q. Did you report to Mr. Holmes what you saw there? A. Yes.

Q. All right, sir, and did he and you discuss the structure number, then, which one it was?

A. No.

Q. Now, is it or is it not a fact that in pouring concrete into forms there is some of what they call slop-over or spill-over concrete? [779]

A. Yes.

Q. And is it or is it not a fact that that gets in between the outer panel of the form and the dirt at times, and sort of cements it in?

A. We paid very close attention that that didn't happen.

Q. Well, does that happen, sometimes?

A. Very seldom.

Q. But when it does happen, then it requires prying, doesn't it?

A. We took care of that; the concrete crew took care of that.

(Testimony of Theodore Gallowa.)

Q. Yes, sir; it requires prying, does it not?

A. We didn't have to disturb the forms at all. We took it out while it was still fresh.

Q. But if it does set, then it requires prying, does it not? A. Naturally.

Q. Now, you spoke of the strong-back being up against the bank. Did you know whether or not the structure excavation was required to be one foot from the neat line, and not one foot from the strong-back? Did you know that, sir? A. No.

Q. Were you told anything about the requirements of the specifications with respect to excavation, Mr. Gallowa? A. No, sir.

Q. Were you told, for instance, that there had been any [780] usual practice in these excavations similar to other excavations in that area?

A. No, sir.

Q. Had you poured in other reclamation areas before this? A. How was that, sir?

Q. I'm speaking of concrete; had you poured concrete in other reclamation areas before coming to this 1062? A. No, sir.

Q. Then this was your first experience in pouring in a reclamation area? A. No.

Q. Well, where else had you poured, sir?

A. Denver, Colorado.

Q. In a reclamation area?

A. Yes, sir, government.

Q. Same type of structures? A. No, sir.

Q. What type of structures were those?

A. Building an ammunition factory for the government.

(Testimony of Theodore Galloway.)

Q. Oh, yes; well, then, that was building pouring?
A. That's right.

Q. And was your experience building pouring, principally?
A. I didn't get that.

Q. Was your experience in concrete pouring principally in pouring buildings? [781]

A. Not necessarily; foundations.

Q. Well, that's for buildings, isn't it?

A. Yes.

Q. Now, was it or was it not—was it principally in construction of buildings, in pouring?

A. Yes.

Q. The handling of the concrete as pertains to conformity to the grades, alignment, proper placement of forms, and the like, was not your function, was it?
A. No, sir.

Q. That was the function of Mr. Jack Holmes, was it not?
A. That I don't know.

Q. In other words, you were distinctly an operator of the machine, to deposit the concrete wherever Jack Holmes or somebody else told you to deposit it?
A. That's right.

Q. And if he told you to stack it up in a pile you would have done it?
A. No.

Q. Why not?

A. That would not have been necessary.

Q. Well, I say, if he told you—he was your superior, was he not?
A. Sure.

Q. Yes, sir; so you had no volition at all as to handling [782] the matter, did you?

(Testimony of Theodore Gallowa.)

A. Well, your Honor, counsel, that would have been very much unnecessary to pour concrete out on the ground just because he said so.

Q. Now, you spoke of the carpenters excavating. Will you honestly tell me exactly what you saw the carpenters doing with a shovel? Just step to this table and illustrate, will you?

A. Well, I wasn't right up against them in the hole. It was a few hundred feet away.

Q. Oh, this was a few hundred feet away you saw that? A. Yes.

Q. Now, what do you mean by excavating?

A. They were digging. Now, what they were digging down in that hole I don't know.

Q. No, sir, and you don't know whether they were digging to set the form in or not, do you?

A. No.

Q. And you don't know whether the form was too large or too small or anything of the sort, do you? A. Well, I don't believe they did.

Q. I don't care what you believe; you didn't know, did you? A. No.

Q. And you didn't take the trouble to go up there a few hundred feet and look before you took this stand, did [783] you, sir? A. No.

Q. And you didn't take the trouble to make any note of any kind, did you? A. No, sir.

Q. Now, were you subpoenaed in Portland to come here? A. No, sir.

Q. Who made the arrangement for you to come?

A. Mr. Schaefer and Mr. Darcy.

(Testimony of Theodore Gallowa.)

Q. And what is the arrangement?

A. They made the arrangement to pay my expense.

Q. What about your earnings from your present employer while you're here?

A. That stops.

Q. You lose that, do you? A. Yes.

Q. Did Mr. Schaefer take a statement from you, sir, before this trial? A. No.

Q. Now, you say that you twice built bridges? Where? A. On job 1062.

Q. Yes; where, sir?

A. Well, as to the exact location I couldn't say, but it was, let's see, south and east of the supposedly airport.

Q. On this job? [784] A. Yes, sir.

Q. On the supposedly airport, you say?

A. Yes, south and east of the Sunnyside airport.

Q. And did you build those, or did you have a foreman over you on those, sir?

A. We had a foreman over us on those.

Q. Who was that? A. Mr. Pat Darcy.

Q. Well, Mr. Pat Darcy was carpenter foreman, wasn't he?

A. He was superintendent of the job.

Q. Oh, yes. Now, when you told counsel about this place where you saw the strong-back close up against the bank, and about 10 feet out at the top — 10 inches out at the top, pardon me, did I understand you to say to counsel that was typical, generally? A. Yes.

(Testimony of Theodore Gallowa.)

Q. How do you know, sir?

A. Well, I was right there pouring the structures.

Q. Are you talking about the excavations in which the forms had been placed and which you were pouring?

A. Yes.

Q. You're not talking about any excavations in which the forms had not yet been built, are you?

A. Oh, no.

Q. Now, in those instances, did you get off your mixer and [785] go and get down in and inspect, sir, or not?

A. No, I didn't make it a natural practice of inspecting.

Q. What, sir?

A. I didn't make it a natural practice of inspecting.

Q. Your function is to stand there on that mixer and pour the concrete when they want it, isn't it, where they want it?

A. Not necessarily so.

Q. Isn't that your main function?

A. That's my main function.

Q. And the tamping of the concrete and the building of the concrete into the forms, that isn't your work at all, is it, sir?

A. No.

Q. Was there any single excavation into which you actually climbed and made measurements and made notations?

A. No.

Q. Or upon which you reported to either Mr. Jack Holmes or Mr. Darcy, while you were there, so they made measurements in your presence?

A. No.

(Testimony of Theodore Gallowa.)

Q. All right, sir. Now, you say Mr. Darcy told you you would be sent back to Portland, and you were sent back; do you remember that?

A. Yes, sir. [786]

Q. When did Mr. Darcy tell you you would be sent back to Portland?

A. When we were caught up with our——

Q. Well, when was that, sir?

A. As to the date?

Q. Yes. A. That I couldn't say.

Q. When did you go back to Portland, sir?

A. Whenever we were caught up with our pouring.

Q. When, sir; what date?

A. I had no idea the dates would ever be mentioned.

Q. Approximate month?

A. I couldn't say.

Q. Did you have any idea that this strong-back up against the wall would ever be mentioned, sir? A. Never.

Q. Now, counsel asked you if what you had been telling was the general situation and you said it was, didn't you? A. Yes.

Q. Now, is that amplified or clarified by what you've told me since, that it refers to those structures around which you were pouring concrete?

A. Yes.

Q. Have you ever operated a transit mixer?

A. No. [787]

(Testimony of Theodore Gallowa.)

Q. Yours is what they call a batch mixer, isn't it? A. Yes.

Q. And a transit mixer is one where the ingredients are put in the cylinder and that is revolved in going from the source of supply to the place of deposit? A. It's mixed in transit, yes.

Q. Now, isn't it a fact that a transit mixer is generally used, quite generally used in building operations? A. It wasn't at that time.

Q. In 1944 you say it was not?

A. Yes, sir.

Q. In the Portland area, sir? A. Yes.

Q. Are you acquainted with the Porter Yett operations in Portland; were you acquainted with those?

Mr. Olson: Which was that?

Mr. Holman: Porter Yett.

Mr. Olson: I object to that, being immaterial, your Honor.

The Court: Sustained.

Mr. Holman: It's collateral, your Honor.

The Court: Sustained.

Mr. Holman: That's all.

Cross-Examination

By Mr. Hawkins:

Q. Did you operate the Mixomobile or the Buggymobile, sir? [788] A. The Mixomobile.

Q. It was the Buggymobile that actually poured the concrete in the structure? A. No, sir.

(Testimony of Theodore Gallowa.)

Q. It was the Mixomobile that did that?

A. Yes, sir.

Q. What function did the Buggymobile serve?

A. The Buggymobile was used in pouring concrete into the structures that we were not able to get to with the Mixomobile.

Q. Now, if the side of the excavation had been six or eight feet or ten feet from the form wall, how would you pour the concrete into the form with the Mixomobile?

A. We had a long chute.

Q. You had a long chute? A. Yes, sir.

Q. And the same thing was true with the Buggymobile, I take it? A. That's right.

Q. As I understand your testimony, the men working for Macri were never ahead of you, is that right? That is, your pouring caught up with them right all the time? A. Yes.

Mr. Hawkins: I think that's all.

The Court: Mr. Ivy? [789]

Mr. Ivy: No questions, your Honor.

Redirect Examination

By Mr. Olson:

Q. Mr. Gallowa, showing you plaintiff's Exhibit 49-1, I ask you what that is?

A. That is the Mixomobile that I operated.

Q. And that shows a tower on it. Was that tower later removed? A. Yes, sir.

Q. By whom? A. By the concrete crew.

(Testimony of Theodore Gallowa.)

Q. And how long after you started the job?

A. Oh, about eight or ten days; maybe two weeks.

Q. Now, showing you plaintiff's—

The Court: Let's see, what was that first one? That's in evidence, isn't it?

Q. Yes, Exhibit 49-1; and then plaintiff's Exhibit 49, being pictures 36 and 35, what does that show?

A. That shows the Mixomobile with the tower off, and a chute attached, pouring concrete.

Q. Is that the same Mixomobile, except for the tower, that's shown on the first pictures, number 1?

A. That's right.

Mr. Olson: That's all.

The Court: Any further recross?

Mr. Holman: No, your Honor. [790]

The Court: Do you have any, Mr. Hawkins?

Mr. Hawkins: Yes, your Honor.

Recross-Examination

By Mr. Hawkins:

Q. With reference to this Mixomobile, as I understand it, you never used the chute?

The Court: It was the tower you were talking about? A. The tower.

Q. You never used the long chute?

A. Oh, yes, we did.

The Court: Did understand that correctly? It was the tower you were talking about, or the chute?

(Testimony of Theodore Gallowa.)

Mr. Olson: There was a chute in connection with the tower which was taken off.

The Court: May I see the picture, please?

Mr. Holman: May I ask another question, your Honor?

The Court: Yes, surely.

Recross-Examination

By Mr. Holman:

Q. The walls of the structures varied in width, did they not, sir?

A. Do you mean as to the thickness of concrete?

Q. Yes, sir. A. Yes.

Q. And the chute out of the Mixomobile would have to be [791] adjusted to those different thicknesses of width, would it not?

A. No, not the different thicknesses of width.

Q. Different thicknesses of concrete, pardon me. In other words, would the chute be poured longitudinally of an interstice between the forms, or would it be poured at right angles to the form?

A. It was poured 'most any way that we could get it in there.

Q. Now, sir, is there less difficulty, less probability of spilling concrete in a seven inch wall to be poured than there is in a five?

A. Naturally.

Q. And when you were answering me you spilled almost no concrete, did you check afterwards to find out whether you did or not?

A. That was checked by the foreman.

(Testimony of Theodore Gallowa.)

Q. Yes, sir; then what you told me is what the foreman told you? I'm asking what you know.

A. What was that question again, please?

The Court: Read it.

(Whereupon, the reporter read the last previous question.)

The Court: Do you understand what the previous question was? [792] A. No, I do not.

Q. Well, I'll re-ask it, Mr. Gallowa. You've told me that you stayed principally on the machine to discharge the concrete as directed by the concrete foreman and the other crew working in the structure excavation? A. Yes.

Q. Now, when you had discharged your load, did you have any function to go and check that concrete? A. No.

Q. And you didn't, did you, sir?

A. Well, I noticed whether I spilled some or not. They told me to shut it down or give them concrete. I noticed at the end of the chute whether it went over or didn't go over.

Q. You noticed whether it would go in between the two walls? A. Yes, sir.

Q. And of course, if it was going in between the walls it was not spilling outside?

A. That's right.

Q. But if there was any additional discharge of concrete beyond the capacity of the wall it would go over, would it not? A. No, sir.

Q. It wouldn't? A. No, sir. [793]

Q. Where would it go?

(Testimony of Theodore Gallowa.)

A. We had what we call a piece of metal that we held up on the side so it would not go over.

Q. In other words, you put a buffet up there?

A. That's right.

Q. You didn't, however, get off of your Mix-master—Mixomobile, and come over on the other side and check the concrete as it was pouring from the Mixomobile?

A. I had no need to check it.

Q. I say, you didn't do it, sir? A. No.

Q. And you never at any time did that as part of your functioning? A. No.

Q. Whatever went on in the form itself was the matter of your concrete foreman and the others who had charge of distributing that concrete around the form? A. That's right.

Mr. Holman: I think that's all.

Recross-Examination

By Mr. Hawkins:

Q. How close to the edge of the excavation did you drive your Mixomobile?

A. That's hard to answer. Sometimes it was very, very close.

Q. Sometimes very, very close; you were the driver of the Mixomobile? [794] A. Yes, sir.

Q. Did you ever knock any of the dirt from the excavation down into the hole? A. No.

Q. You never did?

A. We blocked that before we got there.

(Testimony of Theodore Gallowa.)

Q. Oh, you blocked that up before you got there?

A. No, we blocked the mixer with whatever boards or blocks were around there; once in a while rocks. We would block the mixer so we couldn't go back but so far.

Mr. Hawkins: I see; that's all.

Recross-Examination

By Mr. Holman:

Q. Well, could you tell me approximately how close to a structure excavation wall you came with the mixer; two feet, three feet, five feet, ten feet; how far?

A. Oh, we never did get any closer than maybe five or eight feet, in that matter.

Mr. Holman: That's all, sir.

The Court: Any further questions, Mr. Olson?

Mr. Olson: No, sir.

The Court: You may be excused, then.

(Whereupon, there being no further questions, the witness was excused.)

JACK MILLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [795]

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Jack Miller.

(Testimony of Jack Miller.)

Q. Where do you live, Mr. Miller?

A. Portland, Oregon.

Q. And by whom are you now employed?

A. Concrete Construction.

Q. In 1944 were you employed on the Roza Project, 1062, in Yakima County?

A. Yes, sir.

Q. And in what capacity?

A. Mixer operator.

Q. And what period of time did you work on the job, if you remember?

A. December 4 through March 31, '45, I think it was.

Q. That is, December 4, '44?

A. That's right.

Q. Through March 31, 1945?

A. That's right.

Q. Now, specifically, just what was your work, Jack?

A. Mixer operator.

Q. Did you operate the same machine that Mr. Gallowa had previously operated?

A. Yes, I did.

Mr. Holman: Well, just a minute; well, O.K., it [796] would be based on hearsay, wouldn't it?

The Court: Well, ask him what machine he operated.

Mr. Holman: That's right.

(Testimony of Jack Miller.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, now, Jack, did you have an opportunity to and did you observe some of the excavations within which the forms had been placed?

A. I did.

Q. And did you in your work from the time you went to work, would you pour in each excavation structure, in each structure?

A. During the time I was there, yes.

Q. In other words, there wasn't two crews of you that alternated structures? A. No.

Q. But you were on each one?

A. That's right.

Q. Did you have an opportunity to see any of the excavations before forms were placed in them.

A. I did.

Q. Now, would you describe those excavations with reference to the banks, whether there was slope in the banks, or what the situation was there?

A. Vertical. [797]

Q. Now, after the forms had been placed in these structures, or in these excavations, what was the situation with reference to clearance, lateral clearance? A. Tight.

Q. And by tight what do you mean?

A. There was no clearance, no room, after the form was in there, the strong-backs were placed, why, there was absolutely no room between them.

(Testimony of Jack Miller.)

I've seen several, particularly at the bottom.

Q. Did you see any occasions where the bank had been dug into to accommodate the strong-back?

Mr. Hawkins: I object to that question as leading.

Mr. Holman: I do too, your Honor.

The Court: Well, it's sustained. It is leading.

Q. Did you help remove any of the panels, Mr. Miller? A. No, sir.

Q. You didn't help remove any; did you see any of them removed? A. Yes, sir.

Q. Would you describe what you saw with reference to the panels being removed?

A. I seen the boys working with bars, shovels, two by fours, that they used as a lever to raise these forms out of the hole, and often cases where they've dug into the bank to [798] give clearance for their so-called she-bolts, and the bottom whaler or strong-back, to give clearance enough to lift the form up. On one occasion I had an opportunity to see a crew where they hooked a chain onto a panel, outside panel, speaking of, and pulled it out of the hole with the aid of a truck, because the men couldn't get around it to lift it up. It was too tight against the bank.

Q. What were the depths of some of these excavations? A. Depth?

Q. Depth, how deep were they?

A. Well, they vary as to the type of structure.

Q. Well, can you say from such and such a dimension to some other dimension or depth?

(Testimony of Jack Miller.)

A. Oh, I would say an average, around three or four feet, something like that.

Q. And how deep would some of the deeper ones be?

A. Oh, I believe one there, around eight foot deep. That was over toward the end of the job.

Q. And were there any others that were approximately that deep?

A. Oh, they averaged, like I say, around three or four feet deep.

Q. Now, were you caught up in your pouring operations? Did you have enough work to do in your concrete pouring? [799]

A. No.

Q. What I'm getting at, were you working to capacity?

A. No.

Q. Explain what the situation was in that regard, and what caused it, if you know?

A. Well, you're referring to capacity, and we never was at capacity, because we never had forms enough ahead to pour to.

Q. Did you do any other work besides your concrete pouring?

A. No, sir, outside of maintenance of the equipment; other than that, no.

Q. What was the situation with reference to roads?

A. Well, there was places there——

Mr. Holman: That's objected to, your Honor, under the sub-contract and the principal contract, as being an operation of the sub-contractor, therefore not in issue.

(Testimony of Jack Miller.)

The Court: I'll overrule the objection.

Q. Were there roads provided on the project?

A. Well, yes and no. What I mean by that, there was county roads there, main arteries; other than that, why, no; when you get off into the field a way there was no roads at all.

Q. Now, were you able to pour concrete every day, except for holidays and Sundays were you able to? [800]

A. Oh, no.

Q. Were these shut-downs? A. Yes.

Q. Can you tell the Court approximately how often, for how long a period of time?

A. Well, it happened quite frequently we shut down on account of no forms available to pour.

Q. How long would you be shut down?

A. Oh, anywhere from two days a week, one day a week, to maybe—there was one time there I think we were down a week for the carpenters to get caught up and get a few structures ahead of us so we could come back and really start in again.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Miller, were you the concrete foreman, or just the same, in the same capacity, as Mr. Gallowa that testified?

A. I was mixer operator.

Q. Then you had a concrete foreman over you?

A. That's right.

Q. Now, you told counsel that you observed the excavations in which the forms had been set. Do

(Testimony of Jack Miller.)

you mean that you made measurements or determinations yourself as to those excavations, or that you just saw them while you were on the mixer? [801]

A. I saw them as they were; no measurements or anything like that.

Q. You made no measurements?

A. Oh, no.

Q. You didn't go down into the excavations?

A. I have, yes.

Q. Yes; did you make any notes of any excavations in which you went, yourself, and made observations you testified about? A. No, sir.

Q. And who was your concrete foreman?

A. Mr. Jack Holmes.

Q. Same gentleman? A. That's right.

Q. All right, and did you at the time you saw what you told counsel make any report to him, calling his attention to the particular structure as to number? A. No, sir.

Q. And as to what you saw, sir?

A. We discussed the matter, yes, but as far as numbers or laterals, no.

Q. You didn't say this was structure number so and so? A. No.

Q. Or he did not say it, or there were no notes made? A. No. [802]

Q. Now, did you make any notation or report of any kind to Mr. Pat Darcy? A. No, sir.

Q. And counsel asked you if you were employed by the Concrete Construction Company in 1944, and I believe you said you were then and are now. Have you been continuously since? A. That's right.

(Testimony of Jack Miller.)

Q. When Ted Gallowa was up here you were not on this job? A. That's right.

Q. In other words, you replaced Ted Gallowa, is that right? A. That's right.

Q. And did you bring up any additional equipment of any kind from Portland for your pouring operations? A. No, no.

Q. Or did Jack Holmes order any?

A. That I wouldn't say to.

Q. I mean to your knowledge?

A. Well, that I wouldn't say.

Q. Well, do you know? A. No, I don't.

Q. Well, that's all right.

A. He took care of that himself.

Q. O.K. Now, the Mixomobile which you operated, and which is shown here by 49-1, I believe the photograph is, was [803] operating primarily in the placement of concrete for building, was it not, before it came here?

A. That mixer to my understanding was bought for this job.

Q. What do you mean by your understanding, sir? You mean somebody told you?

A. No, I seen it when it arrived down there, shipped up here.

Q. You what, please?

A. I was there when it arrived in the warehouse in Portland, and was immediately sent right up here.

Q. You tell me, sir, that that Mixomobile had not operated in Portland before it came here?

(Testimony of Jack Miller.)

A. As I say, I understood it was bought purposely for this job.

Q. You tell me now, sir, that you saw it arrive as purchased, and immediately shipped up here without operating in Portland?

A. Well, I wouldn't say that; we have a number of jobs. Like I told you, to my understanding it was bought for this job.

Mr. Olson: I don't believe this is proper cross-examination. I didn't go into the Portland operations with this man. I asked him about what he did out on this Roza project. Now, counsel's done this two or three times, gone into what happened down in Portland. My only [804] objection is it takes a lot of time, and doesn't relate to anything I interrogated about.

The Court: I think it might be material to show where this machine was used before, if he knew it, but ordinarily a man operating a machine wouldn't know where his boss got it, or where it operated.

Mr. Holman: That is correct. The only way it got my attention was he was there to say it came up here without operating at all. That's what I was interested in.

The Court: Well, proceed, then.

Cross-Examination

(Continued)

By Mr. Holman:

Q. How long have you been a concrete pourer, Mr. Miller?

A. I didn't understand that part.

(Testimony of Jack Miller.)

Q. How long have you been a concrete pourer?

A. Concrete pourer?

Q. P-o-u-r-e-r, yes, pouring concrete?

A. You mean an operator, then?

Q. If you called it operator; you know what I mean, sir.

A. Well, I've been doing that approximately two years.

Q. Well, what were you doing in 1944?

A. Previous to coming up here?

Q. Yes.

A. Pouring buildings, driveways, sidewalks, and the like of that. [805]

Q. Pouring concrete? A. That's right.

Q. And with the same type of mixer?

A. We have another one of the same type, yes.

Q. That was the one you were using?

A. Yes.

Q. Now, isn't it a fact that in pouring for buildings or basements there is a structure built somewhat of the same general plan, but much larger, than one of these structures in the field here, but your whole pouring operation is at one time, in one spot, isn't it? A. That's right.

Q. And if you're pouring a concrete wall it is all one operation, a continuous line operation, isn't it? A. That's right.

Q. Now, this wasn't a continuous line operation, was it? A. On 1062?

Q. Yes, sir.

A. We had a brief movement in between each structure.

(Testimony of Jack Miller.)

Q. Would you say it was brief to move a half mile?

A. It would only take a few minutes to move that far.

Q. Or a quarter of a mile? That would only take a few minutes?

A. That's right.

Q. But you wouldn't have a line operation like you would [806] pouring the basement or the wall of a building, would you?

A. Oh, no.

Q. And this Mixomobile is for that type of operation, line operation?

A. That is designed for 'most any operation under pouring concrete.

Q. Yes, sir; isn't it primarily designed for pouring mass concrete in line of operation?

Mr. Olson: It's not proper cross-examination.

The Court: I'll overrule the objection. He may answer if he knows.

A. That mixer is designed for mass operation, yes.

Mr. Holman: That's all.

The Court: Any questions, Mr. Hawkins?

Cross-Examination

By Mr. Hawkins:

Q. Mr. Miller, did the mixer ever break down while you were on the job?

A. A couple of different times, yes.

Q. Did you ever have any trouble with the roads while you were on the job, getting the mixer around on account of the roads?

A. Yes, sir.

(Testimony of Jack Miller.)

Q. Well, with reference to capacity operation, the roads would have prevented you from operating at capacity at [807] any rate, would they not?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)

A. Well, I just don't quite understand how to answer that one. If we had had better roads out there we could have poured at better conditions, or more concrete.

Q. In other words, condition of the roads is one of the things that help you up on that job?

A. Well, not too much.

Q. But it was one of the things that did hold you up on the job? A. Well, yes.

Q. And on occasion you had difficulty getting cement, is that not right?

A. That I don't know.

Q. Were you ever held up by lack of cement?

A. That was out of line; every time we was ready to pour concrete it seemed to me the cement material was always available.

Q. Did you ever operate the Buggymobile, sir?

A. The Buggymobile? No.

Q. With reference to this occasion when you saw a truck pulling one of the forms out, was that a deep excavation of six or eight feet, or was it one of the shallow ones, [808] three or four feet?

A. That was probably a six foot, I would say.

(Testimony of Jack Miller.)

Q. And did you get down and check the footing, to see what the condition was there?

A. The footing?

Q. Yes. A. No, I didn't.

Q. You wouldn't know, then, whether that form was being held in place by spillage cement, or not, would you?

A. That particular time that particular instance occurred——

Q. Just a moment; what did you say?

A. It occurred this way: We finished our pour about quarter after four, and the stripping crew was following behind, so I cleaned out the mixer and stepped back to watch the performance; I was interested, and that's when I seen it, and I did see that the bank was so close that it had caved in on the bottom strong-backs.

Q. It had caved in on the strong-back?

A. Yes, it was so close, in other words, vertical, the bank had caved in, and was jammed against the form, which wedged it in there.

Q. But you can't say that that was due to the spillage of concrete?

A. There was no concrete in there that I could see.

Q. Would that have been due to the Mixmobile operating too [809] close to the bank, to cause the caving? A. No, sir.

Q. What did cause the caving of the bank, then, if you know?

A. That's conditions that I couldn't tell you. It was natural, I guess.

(Testimony of Jack Miller.)

Q. Well, with the bank up against the strong-back there would be no occasion for it to cave in unless there was some weight put against it, is that right?

A. Well, you have lots of slides. I don't know how they start.

Mr. Ivy: No questions, sir.

The Court: Any further questions?

Mr. Olson: No, sir.

The Court: You may be excused, then.

(Whereupon, there being no further questions, the witness was excused.

(Short recess.

(All parties present as before, and the trial was resumed)

Mr. Hawkins: Your Honor, I wonder if Mr. Miller could be recalled to the stand for further questioning?

The Court: All right.

JACK MILLER

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Hawkins: [810]

Q. With reference to the capacity of this Mixomobile, how many yards can that Mixomobile pour in one hour? A. In one hour?

(Testimony of Jack Miller.)

Q. Yes.

A. Under what conditions, please, are you referring to?

Q. The normal operating conditions.

A. At one standing setting?

Q. Yes.

Mr. Olson: If you know, Jack.

A. Oh, that I wouldn't answer to.

Q. Well, you operated this Mixomobile, did you not, sir? A. That's right.

Q. And you don't know what its capacity is?

A. Well, that varies.

Q. Well, on direct examination you testified that you were never able to operate at capacity. Now, I presume that you must have something in mind when you speak of capacity.

A. Well, I'd say per hour we should hit, oh, twenty to thirty yards an hour.

Q. Twenty to thirty yards an hour?

A. Yes, sir.

Q. And did you know that there were approximately 1500 yards on this entire job 1062?

A. I did not know. [811]

Mr. Hawkins: All right, that's all.

The Court: Any other questions?

Mr. Olson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JACK HOLMES

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Your name is Jack Holmes? A. Right.

Q. Where do you live?

A. Portland, Oregon.

Q. And now, by whom are you employed?

A. Concrete Construction.

Q. During the summer of the year 1944 were you employed on Roza Project 1062?

A. That's right.

Q. And in what capacity?

A. What capacity?

Q. In what capacity were you employed?

A. As a foreman.

Q. And in what type of work?

A. On the concrete crew.

Q. Concrete foreman?

A. That's right. [812]

Q. And by whom?

A. Schaefer, Concrete Construction Company.

Q. All right; now, do you know the period that you worked on the project, about?

A. Approximately; well, it was from the 31st of July until the 30th of March in '45.

Q. You were with the concrete pouring throughout the entire job, then? A. Yes, sir.

(Testimony of Jack Holmes.)

Q. Now, I'll ask you first, were you right with the concrete pouring equipment as it was placing concrete in the structures? A. Yes, sir.

Q. And did you have an opportunity to and did you notice the clearance, if any, between the outside panel of the structures in the excavations, and the bank of the excavation?

A. They were tight.

Q. Could you amplify that word "tight" a little bit, Jack, so we know whether you mean that there was some space, or that they were flush, or just how they were?

A. Well, they'd have to dig out sometimes to put the she-bolts in, and for the strong-backs and the whalers.

Q. Now, was that a general, typical situation existing in each of the structures? [813]

A. Yes, sir.

Q. Did you have an opportunity to and did you observe the carpenters doing any excavating?

A. Oh, just by traveling from one structure to the other, we would pass them, sometimes, and see the carpenters working, maybe; sometimes they were doing excavating with shovels.

Q. Now, was your crew able to operate, your concrete pouring crew able to operate to capacity, Mr. Holmes? A. No, sir.

Q. And why?

A. Because there were not enough structures ready.

(Testimony of Jack Holmes.)

Q. What part or parts or how much of the job was that true, that you were held up because structures were not ready, structure forms were not ready?

A. Well, some days, say the first of the week, why, we'd skip around and pick up the structures that was behind, that weren't ready at the time we passed them; we had to go back and pick them up always the first day, and then the next day, maybe we'd get an average pour, and then the third day, why, there was never a full day in the pouring.

Q. Well, how about the fourth and fifth day?

A. Well, generally I'd turn the concrete crew over to Mr. Darcy and I and the operator would catch up on the equipment, [814] what needed repair.

Q. Did that continue throughout your time on the project? A. Yes, sir.

Q. Did you see them take any, or do any stripping, taking the forms off of the structures after concrete pouring?

A. Not much of that; just very little.

Q. Pardon? A. I didn't.

Q. You didn't observe that?

A. I didn't observe that.

Q. You say you turned your crew over to Mr. Darcy? A. That's right.

Q. When you were out of pour would that be your entire crew, or just part of it?

(Testimony of Jack Holmes.)

A. That would be the crew with the exception of the mixer operator and myself.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Holmes, you say you'd turn your crew over to Mr. Darcy, then do you say that your crew consisted of your mixer operator and yourself?

A. With the exceptions of myself and the mixer operator.

Q. Well, is that the concrete crew, you and the mixer operator? A. No, sir. [815]

Q. Who else did you have; I'm speaking now of the concrete crew, sir?

A. That's the truck drivers and the laborers.

Q. Yes, those that handled the concrete as distinguished from handling the forms or doing any shovel excavation or anything else?

A. I was speaking of the concrete crew.

Q. Yes; the concrete crew consists of what, you as the foreman, and an operator, and what else?

A. And two truck drivers.

Q. And two truck drivers?

A. And two laborers.

Q. Two truck drivers, two laborers, Mr. Holmes, and the equipment operator?

A. The mixer operator.

Q. The mixer operator. Now, was that a constant crew, right along?

A. That was the general——

(Testimony of Jack Holmes.)

Q. Sir?

A. That was the general crew that we had on the concrete.

Q. So that all of the time that you were pouring you had the two truck drivers, two laborers, yourself, and the mix operator?

A. That's right.

Q. Well, did the mix operator operate the Buggymobile, or [816] did you operate it, or who operated that?

A. The mixer operator, he stayed on the mixer.

Q. Well, who operated the Buggy?

A. Well, either one of the truck drivers or one of the laborers.

Q. That would be under your direction?

A. Yes.

Q. And will you explain what the Buggymobile was used for, in due relation to the Mixomobile? A. What it was used for?

Q. Yes, how did it co-ordinate with the Mixomobile?

A. Well, we used that in regards to structures that we couldn't get to with the mixer, some that was off in the fields too far.

Q. Yes, if it was a job too far away to pay to take the Mixomobile down there, then you'd send the Buggy? A. Yes, that's right.

Q. And would that be for small structures?

A. Not necessarily.

Q. Any structure, if it was better economy for the Concrete Construction Company, they'd send the Buggymobile instead of the Mixomobile?

(Testimony of Jack Holmes.)

A. That's right.

Q. Now, the Buggymobile was quite easily handled around, wasn't it, as I remember the picture, a little tricycle [817] effect?

A. It wasn't easy.

Q. It was light weight, wasn't it?

A. Yes, it could get over the ground.

Q. It could get over anything?

A. Well, I wouldn't say anything.

Q. Well, out there it was to get around anywhere?

A. To places where we couldn't get the Mixomobile; there was no roads.

Q. Just the same as tricycles, for quick delivery?

A. No, that was for places where there was no roads, and we couldn't get the Mixomobile down there because there was no roads.

Q. Now, had you ever operated on one of these reclamation projects before, where structures excavations were poured?

A. I was never a foreman on anything like that. I have worked as a laborer.

Q. Yes, sir; this was your first job as foreman on a reclamation project?

A. That's right.

Q. And in practice, isn't there a movement operation, dependent entirely upon the one driving the Mixomobile, as to where he sets it, and how close he sets it to an excavation, and where he sets it with respect to the [818] excavation, isn't that up to the driver of that Mixomobile?

A. That's up to me where he sets it.

(Testimony of Jack Holmes.)

Q. That's up to you? A. Yes, sir.

Q. Now, did you at any time stake any roads, or direct any roads to be made?

A. The roads was——

Q. Pardon me; answer me, please, whether you did or not. A. Direct the mix operator?

Q. Did you ever stake any roads, and direct that they be made?

Mr. Olson: That's objected to, if your Honor please. I didn't go into it with this witness. In the second place the Concrete crew certainly wouldn't be the road building crew, but it certainly wouldn't be proper cross-examination.

The Court: I'll overrule the objection.

Q. Answer the question, please.

A. Well, I didn't stake any roads, no, sir.

Q. No, sir, nor did you mark out any place where you wanted any roads, at any time?

A. Well, that really wasn't——

Q. Did you do it, please? Tell me whether you did it or not? [819] A. No.

Q. All right, sir. Did you make any notation of any structure that you inspected? A. No.

Q. Did you get down into any structure and inspect it, down in the structure itself?

A. As for what reason?

Q. Just inspect it, sir; you're testifying. Did you get down in those structures, in the excavations, and inspect them?

A. I went down in the structures; I inspected all the structures.

(Testimony of Jack Holmes.)

Q. Well, that was after they were poured?

A. That was before they were poured.

Q. You went down into the forms?

A. I was all around them, yes, sir.

Q. But did you make any measurements with respect to the structures? A. No.

Q. The structure excavations; now, the matter of setting the forms up, bolting them together with the strong-backs and the she-bolts and so forth was not your operation, was it? A. No, sir.

Q. That was an operation of some other person than yourself? A. That's right. [820]

Q. And when you spoke of having to excavate to get the she-bolts in, and then put the strong-backs on, it's done in reverse order, isn't it, the strong-backs are on first, on the forms?

A. Well, they had to excavate to get those in.

Q. Can you tell me whether the strong backs are on first, before the she-bolts, or not?

A. Should be.

Q. Now, you say the excavations were tight, and both of your previous concrete men have said they were tight. Regardless of the excavation's position, was there anything to interfere with the pouring of the concrete in the forms, for your operation, once the forms were set up?

A. Yes, there was.

Q. Well, what?

A. Getting to the structures, for one thing.

Q. Well, that's this road question we covered, isn't it? A. Yes.

(Testimony of Jack Holmes.)

Q. But let's for the minute eliminate the road question. Was there anything with respect to the actual location itself, once the form was in, that would hold up your pouring? A. No.

Q. So that if the forms were in, you could pour? A. Naturally.

Q. What is the hourly capacity of the Mixomobile for pouring? [821] A. On——

Q. Pouring, what is its capacity?

A. ——this job?

Q. Whether it poured on the floor of this room, or anywhere, what was the capacity of that Mixomobile?

A. Well, it varied from 12 to 25 an hour, I imagine.

Q. Depending on what?

A. On the conditions of the trucks, and getting the material to the mixer, and the forms.

Q. Well, assume that the Mixomobile is set in place and has a job of pouring ahead of it; what was its capacity?

A. Well, I say it varies.

Q. Well, you mean it might be delayed by the materials being brought to the Mixomobile?

A. That's right.

Q. The sacks of cement, and the sand and gravel, and so forth, had to be brought to the Mixomobile?

A. Yes, sir.

Q. And that was your trucks doing that?

A. That's right.

(Testimony of Jack Holmes.)

Q. And that was part of your operation?

A. That's part of the operation, yes.

Q. Under your direction as concrete foreman?

A. And in pouring, yes. [822]

Q. And as the Mixomobile moved further away from the source of supplies, was the trucking for the cement and the gravel and the sand also extended?

A. The trucks, we never waited on the trucks on this job at all.

Q. Never waited on the trucks? A. No.

Q. And if the Mixomobile was at one end of the job, and the supplies down at the other end of the job, is that where you would go for them, or would they be moved up?

A. That's where we went; one place all the time.

Q. And where was that?

A. That was over at the plant, over at the stock-piles.

Q. Over there, I think they called it the job yard, was that the place?

A. No, that was at the stock-piles.

Q. Where were the stock-piles, Mr. Holmes?

A. I don't remember the name of the road that they was on.

Q. They were on a road? A. Yes, sir.

Q. And each time that your Mixomobile needed new ammunition, so to say, new ingredients, your trucks would go back and bring them up and put them in? A. That's right.

(Testimony of Jack Holmes.)

Q. Now, you say there were no delays on that whatsoever? [823] A. No.

Q. The trucks never broke down? A. No.

Q. What was the average haul for the ingredients that went into the Mixomobile?

A. I didn't understand that.

Q. What was the average haul; how far would they haul it? A. What, the concrete?

Q. The ingredients that would go into the Mixomobile?

A. We didn't haul it in the Mixomobile; we hauled it in the trucks.

Q. I understand that; what would the average haul be?

A. From the stock pile to the Mixomobile?

Q. Well, what would it be, a mile, two miles, what would it be?

A. It varied from a mile, two miles, to eight miles.

Q. Did your crew stand by while the Mixomobile was mixing those ingredients?

A. Yes, sir.

Q. They remained idle?

A. If they had a load on them, they were standing by, yes.

Q. Yes, and if they deposited their load, what?

A. They would go back to the plant for more.

Q. Now, you told counsel that you would sometimes pass, and maybe sometimes there was a little excavation being done [824] by the carpenters; you

(Testimony of Jack Holmes.)

have no independent recollection of any particular place where the carpenters were doing excavation?

A. No.

Q. And when you use the term "excavation" what do you mean, Mr. Holmes?

A. In the word "excavation"?

Q. Yes; what do you mean, as a concrete man, when you talk about excavation?

A. Well, that's really out of my line; I didn't pay any attention to that at all, but excavating would be digging a hole.

Q. In other words, you haven't been and have never been an excavator?

A. Oh, yes, I was.

Q. Have you been an excavator?

A. I've dug holes with shovels, yes.

Q. Structure excavation? A. No.

Q. Well, I guess we've all dug holes with shovels, but I'm talking about structure excavation.

A. No, never did.

Q. And you have never fine graded?

A. No, sir.

Mr. Holman: That's all. [825]

The Court: Mr. Hawkins?

Mr. Hawkins: No cross-examination.

Mr. Ivy: No cross-examination.

The Court: Any redirect?

Mr. Olson: No.

The Court: You may be excused. Call the next witness.

(Whereupon, there being no further questions, the witness was excused.)

A. E. MERCILLE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. A. E. Mercille.

Q. M-e-r-c-i-l-l-e? A. Yes.

Q. Where do you live?

A. Chewelah, Washington.

Q. Now, let me ask you this: Are you employed by the Concrete Construction Company now?

A. No.

Q. Were you employed by the Concrete Construction Company in 1944, on job 1062?

A. Yes.

Q. And in what capacity? [826]

A. I was carpenter.

Q. Now, did you assemble forms out on the field, or in the yard? A. In the yard.

Q. Did you assemble any of them out in the field? A. What is it?

Q. Did you do any work out in the field at all, carpenter's work? A. No.

Q. Now, in your assembling of forms there in the yard, did you have an opportunity to observe and did you observe the type of lumber that was furnished you? A. Yes.

Q. And would you describe it to the Court?

A. What kind of lumber we had?

(Testimony of A. E. Mercille.)

Q. Describe the lumber, yes, its condition.

A. We were short of lumber all the time.

Mr. Holman: Move that be stricken as not responsive.

The Court: Yes.

Q. As to condition?

The Court: He wants to know what kind of lumber it was.

A. We had shiplap, and two by four, and two by six, and two by twelve, and very little plywood.

Q. Now, will you describe it as to quality?

A. We had some good one, and lots of bad one; mostly bad one.

Q. And what was the matter with it?

A. It was too wet, rotten, knot hole every foot; get hold of a two by four and you had three pieces in your hand. You start to build a big panel, you had to splice it, nail it twice.

Q. Do you recall any used lumber coming in?

A. Yes, we had lots of used lumber.

Q. And what would be the condition of that lumber?

A. Oh, there was nails in it, and it was rotten, and tar paper.

Q. What would you have to do with that lumber?

A. We had to clean it all up and get it in shape to pass it through the saw and use it.

Q. Would it be possible to use the lumber with the nails still in it? A. No, sir.

Q. Could you use it with the tar paper still on it? A. No, sir.

(Testimony of A. E. Mercille.)

Q. And what did you have to do with the parts of it that was broken?

A. What we had to do with it?

Q. Yes; could you use the broken parts? [828]

A. Some of it we could cut in small pieces for different structures. Most of it we had to take another piece and use it.

Q. Now, with reference to whether or not you had a supply on hand to work with, did you have a supply on hand?

A. Sometimes we had some on hand, and sometimes we didn't have enough to complete a structure; we were short of so many pieces, short of two by four, sometime we had enough shiplap and no two by four at all.

Q. I didn't get the time, I don't think, Mr. Mercille. When did you start on this job?

A. March 14.

Q. That's right in the beginning? A. Yes.

Q. And how long were you on the project?

A. I was there until the last day, April—April, some time.

Q. You were there from beginning to end?

A. Yes, April, 1945.

Q. Now, how about your form making operations there in the yards; were you ever held up because of lumber? A. Yes, lots of times.

Q. And what about the—did you ever have to re-make any panels? A. Yes, lots of it.

Q. And what brought that about; why did you do it, or was [829] there any reason for it?

A. We made some new ones, you mean?

(Testimony of A. E. Mercille.)

Q. I asked if you ever had to take old panels and re-make them into new panels? A. Yes.

Q. What caused that?

A. Because we had no lumber in the yard.

Q. Did you do any re-assembling or patching in the old panels there? A. Yes.

Q. I notice on some of these exhibits here, these panels, which are plaintiff's exhibits 45, 46, 47, and 48, that there's some tin patch-work on them. Did you have any occasion to do any of that work?

A. I done pretty near 'em all.

Q. And just tell the Court where you got the tin, and how you happened to put it on.

A. I got that tin downtown in a grocery store, they were giving it away; and I took four or five pieces, and I cut them in four or five pieces, and put them over the knot-holes, and where the veneer has gone all to pieces, and make the concrete smooth.

Q. Now, I notice some of these panels here, and particularly plaintiff's Exhibit 45, has several pieces of veneer, and it is patched with veneer patches. Why was that done? [830]

A. Because we didn't have the right length of veneer; we had to put another piece on it, and cover that hole there, and it was all pieces.

Q. Why would you put these tin patches on the corner instead of taking a new piece of veneer?

A. We didn't have any.

Q. Didn't have any of them?

A. Any veneer.

(Testimony of A. E. Mercille.)

Q. What would you do, Mr. Mercille, when you ran out of lumber and didn't have any to work with?

A. Well, we worked on the steel work, and tear some old form and try to build a form to send in the field to keep the carpenters going.

Q. Now, did you ever—were you out on the field from time to time?

A. Yes, I hauled some structures in the field, and I took some back to the shop to fix it and re-build it.

Q. You say you hauled some out?

A. Yes.

Q. With a truck, or what?

A. With the truck.

Q. And you did what else? A. What?

Q. You said something else about hauling.

A. Hauling some structures in the field, and taking some old [831] one back and re-build it in the yard.

Q. Now, when you did that, did you have an opportunity to observe excavations? A. Yes.

Q. Did you go past any holes where the carpenters were working?

A. Pretty near all the holes, they were working on; you go by with the truck, they have a pick and shovel in their hand, and the carpenters doing the work.

Q. Did you see that?

A. Yes, I seen that thousands of times.

Q. Working with what?

(Testimony of A. E. Mercille.)

A. With a shovel and pick. When they put their form in, they was too short, or one short end, or too wide on the other. They had to dig it back. It was just a square hole.

Q. Now, I believe you said that you didn't assemble any of the forms in the holes themselves?

A. No.

Q. In connection with your hauling of panels out, and hauling them back, did you know whether or not the carpenters had to wait for an excavation to be ready for them to assemble the panels in?

A. Lots of times.

Q. Did you see that, did you, Mr. Mercille?

A. Yes, I seen it.

Q. Did you ever have to go out, or did you go out, and bring in to the yard from some other place?

Mr. Holman: Your Honor, I object to counsel calling for yes and no answers. This witness can tell what he did. I think it's leading.

The Court: Well, I think it's all right for him to ask that question. I'll overrule the objection, if he did go out.

Q. First, did you do it, Mr. Mercille?

A. Yes, sir.

Q. All right; now, would you tell of the occasion, and explain it?

A. I went down and got lumber on the other job to keep this job going. That lumber was supposed to be on our job.

Q. When you refer to the other job, what do you refer to, Mr. Mercille?

A. 58.

(Testimony of A. E. Mercille.)

Mr. Holman: 1068? A. 1068.

Q. You went down to 1068 and got lumber. Why did you do that, Mr. Mercille?

A. Because we had no lumber to work.

Q. Now, also in connection with hauling out panels and bringing them back in, did you have an opportunity to observe [833] any of the stripping, form stripping, taking forms off of the panels; did you have an opportunity to see that?

A. Yes, I see lots of it pulled off.

Q. And would you explain what you saw in that regard?

A. Well, they couldn't pull it off because there was no room to pull it off; the form was right against the dirt. They had to take the strong-back off and dig to get it out, and they used the truck several times, and they damaged the structure quite a bit.

Q. You say they damaged the what?

A. The form.

Q. Did you help do any of that stripping yourself, Mr. Mercille?

A. A few of it; not very many, because I was working, but with the truck I give them a hand to pull it out, because it was impossible to dig by hand, it was too hard, otherwise they take two or three hours.

Q. You helped with the truck, pulling them out. Now, were you ever with Mr. Macri on this job?

A. Yes, Mr. Macri come on the job, and it was impossible to go in the field. I took the truck and

(Testimony of A. E. Mercille.)

I took him over there. We measured a few structures and we come home.

Q. Who else was there?

A. The carpenter foreman on the job, Mr. Klugg.

Q. John Klugg? [834] A. Yes.

Q. And yourself?

A. Yes, and Mr. Macri.

Q. Who did the examining of the forms?

A. The carpenter foreman, and Mr. Macri was watching him, and so was I.

Q. Was there anything said in Mr. Macri's presence about whether they——

A. Mr. Macri said they was ready to go to work, Mr. Schaefer to go to work, and we said it was wrong, not ready to go to work, just a square hole. He talked to the foreman right there, and I was there, never measured myself, the foreman measured, and maybe one corner was all right and the rest was wrong, so we went back to the yard.

Q. How many excavations were checked?

A. Oh, we checked seven or eight, maybe nine.
Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. And when was that you checked with Mr. Macri and Mr. Klugg? A. What is it?

Q. When; when?

A. I think that was done May 12, May 15 or 20, between that time. I don't know the exact date.

(Testimony of A. E. Mercille.)

Q. 1944? [835] A. 1944.

Q. Did you make any note at that time?

A. No.

Q. Did Mr. Macri make any note in your presence?

A. I don't know; he just told my boss that those holes were not ready.

Q. Did Mr. Klugg make any note in your presence?

A. I don't know. To me? Oh, yes, he told me they were all wrong.

Q. Did Mr. Klugg make any note, write anything?

A. I didn't see him write anything.

Q. Did you see Mr. Macri write anything?

A. I don't know.

Q. Now, you say Klugg made all the measurements? A. Yes.

Q. You didn't measure with Klugg?

A. No.

Q. Macri didn't measure with Klugg, Mr. Macri?

A. No, he just took Klugg's word.

Q. And did Klugg report these were out of line?

A. They were all wrong, he said.

Q. Pardon me; did Mr. Klugg report to Mr. Macri that they were out of line?

A. I don't know.

Q. No, sir; so when you say they were out of line, and so [836] forth, you're giving your own idea of what you saw at that time?

(Testimony of A. E. Mercille.)

A. Because the carpenter foreman was there and he measured it out, and he said they were all wrong, it was not ready for the structures.

Q. That's just what I asked you, if the carpenter foreman said they were out of line, and you said no.

Mr. Olson: That's not right. He said yes, and you said "reported"; that's what confused him.

Q. I don't want to confuse you. Did Mr. Klugg tell Mr. Macri that these forms, these excavations that you checked were out of line? A. Yes.

Q. Did he tell him that they were not completed?

A. Yes, he told him they were not completed.

Q. And what else did he tell him?

A. I don't know exactly what else he tell them; they were talking all the time.

Q. This is all in your hearing? A. Yes.

Q. Is it or is it not a fact that in that same meeting and conversation you made this statement, in substance, in the hearing of Mr. Macri and to him, that "I don't know why the Concrete Company doesn't fill these forms and get them back here so we can re-make them"? [837]

A. I never say no such thing.

Q. You never said any such a thing? Now, if there was any error in the forms themselves, the size, the panels in the forms as to dimensions, that would be your fault, wouldn't it?

A. Not exactly.

(Testimony of A. E. Mercille.)

Q. Well, it would be the fault of the carpenters, anyway, wouldn't it?

A. Those forms was made right from the structure it called for.

Q. Yes, but if it was made wrong, it would be you that was making it wrong, wouldn't it?

A. No.

Q. Who would be making it wrong?

A. The carpenter foreman is in charge of that.

Q. And who was your carpenter foreman?

A. John Klugg.

Q. Now, Mr. Mercille, isn't it a fact that you and John Klugg for some considerable time were the only two men making forms?

A. Yes, because we didn't have——

Q. How long was that?

A. Will you say it again?

Q. How long was that the case, just you two, just you two, Mr. Klugg and you, how long were just you two making [838] forms, the only two there?

A. Oh, there was more than two; we was three and four.

Q. Well, are you sure of that, sir?

A. In the yard?

Q. At the start; yes, sir.

A. Yes.

Q. How long were there three or four?

A. Oh, I can't recall it; they were there quite a while.

(Testimony of A. E. Mercille.)

Q. Was there any time that just you and Mr. Klugg were there? A. Alone? No.

Q. And how large was the carpenter crew for the first five or six weeks?

A. We were four or five there, actually, all the time.

Q. Four or five; all right. Now, were you the one to estimate the quantity of lumber required for the forms for 1062? A. No.

Q. Who did that? A. I don't know.

Q. You didn't do it? A. No.

Q. No, sir. Did you ever know how much lumber was delivered at the start for building forms for 1062?

A. I don't know exactly how much.

Q. Do you know how much lumber was delivered for building [839] forms before any form was filled with concrete? A. Not very much.

Q. You don't know how much lumber?

A. No.

Q. Can you tell me whether or not you saw any forms built and remain in the field without concrete in them for several months?

A. Not for several months; just for a little while, because we were waiting.

Q. How long, sir?

A. I don't know exactly how long; I never checked.

Q. Isn't it a fact, Mr. Mercille, that forms were in the field as early as April, 1944?

A. I don't think we took any form in the field in April.

(Testimony of A. E. Mercille.)

Q. May, 1944?

A. I can't recall the date when we took it in the field.

Q. June, 1944?

A. Yes, there was from that time.

Q. Yes, sir, and were they filled with concrete then, or not?

A. I can't recall the day they started to pour concrete.

Q. No, sir; when did you first see any concrete poured in any of the forms?

A. I don't remember. I was not there in that part of the field; I was in the yard. [840]

Q. You saw them stripping, didn't you?

A. Yes.

Q. The concrete had been poured when you saw them stripping?

A. Yes, the concrete was in the form.

Q. When was that?

A. I can't give you the date.

Q. Did you see any forms in the field that had become weathered and checked?

A. Yes, there was some in the field that was checked.

Q. And you don't know how long they were there?

A. I don't know.

Q. Who delivered the forms from your job yard to the field?

A. I did.

Q. Yes, sir; then you do know of the delivery of every panel that went on the job, don't you?

A. Not every one of them.

(Testimony of A. E. Mercille.)

Q. Well, didn't you make the deliveries, sir?

A. Yes; not all the time.

Q. You didn't make the first deliveries?

A. Yes, I made the first deliveries.

Q. When did you make the first deliveries, approximately? A. I can't tell you.

Q. Now, was that the time that you were talking about the holes being dug wrong, and so forth, when you first made the deliveries? [841]

A. No, that's the time when we checked those structures with Mr. Macri.

Q. Well, didn't you tell me that was in May, you thought? A. Yes.

Q. Had there been forms put in by that time, or not?

A. Yes, there were forms put in by that time.

Q. Now, don't you know, sir, as a matter of fact, that there wasn't a bit of concrete poured until July 31?

A. I don't know which date; I know it was quite a little while.

Q. You were right here and heard these witnesses testify, did you not, sir? Now, is that your recollection, or not? A. What?

Q. Is it your recollection that there was any concrete poured before July 31, 1944?

A. I don't know when they started pouring concrete in those forms. That was the concrete crew.

Q. Can you tell me how much lumber, in board feet, was delivered to that job yard, that you know of?

(Testimony of A. E. Mercille.)

A. I don't know how many board feet; we got so little at a time it was hard to keep track of it.

Q. Just disregard anything except the question that I want to ask you, Mr. Mercille. Can you tell me approximately the number of board feet of lumber that was delivered to that job yard while you were there? [842]

A. No.

Q. All right. Can you tell me approximately the quantity of veneer panels that was delivered there?

A. There was very little.

Q. Can you tell me approximately the quantity, please?

A. They came at different times.

Q. Can you tell me approximately the quantity, please, the amount?

A. I don't know the exact amount. The time they come, it's ten or fifteen sheets.

Q. Mr. Mercille, isn't it a fact, sir, that you kept charge of the veneer panels, they were not allowed to stay out in the yard, but they were kept in under Schaefer's roof?

A. No, that was not the fact. They never was in Schaefer's shack; they was in Mr. Macri's.

Q. Now, let's get to this second hand lumber and nails. Didn't that come off of one Mr. Schaefer built?

A. No, that lumber was new, that we used on the job, some of it.

Q. Wasn't the tar paper that you got back off that job afterwards?

(Testimony of A. E. Mercille.)

A. No, that lumber come from Seattle, and some other places.

The Court: We'll recess now until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.) [843]

Yakima, Washington, Monday, March 3, 1947,
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. Mr. Mercille, according to Macri's identification 16, the Concrete Construction Company payroll, a certified transcript of the labor payroll, I call your attention to the entry, "A. E. Mercille, 8 hours on Wednesday, March 15," the end of that week; now, that's the time you came on?

A. March 15.

Q. And at that time Mr. John Klugg was the carpenter foreman. Now, there was one other carpenter, was there not, Robert Conrad, was it?

A. Monrad.

Q. All right. Now, then, taking the next week, that was three of you that week, wasn't it? The next week shows in addition to you three men two others, does it not? A. Yes.

(Testimony of A. E. Mercille.)

Q. A man by the name of Golden and a man by the name of—— A. That's five.

Q. Yes, sir, Klugg remaining as carpenter foreman, and the rest of you as carpenters, correct?

A. Yes.

Q. Then it is a fact, is it not, in that payroll for the week [844] of March 29, Klugg remained the carpenter foreman, and F. E. Waltie was also marked as a carpenter foreman, right?

Mr. Olson: If your Honor please, I don't believe it is proper to cross-examine the witness as to a payroll which he obviously didn't keep; it was no part of his job, what the payroll shows, and the payroll would speak for itself, what it shows.

The Court: It doesn't strike me as proper cross-examination. He had nothing to do with making up the payroll.

Mr. Holman: I just had one more question to ask, your Honor.

The Court: Well, there's an objection made, which I'm inclined to sustain.

Mr. Holman: This next question I think will show it.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Was there any time that you became a carpenter foreman? A. Not on that job.

(Testimony of A. E. Mercille.)

Q. That's what I was after, your Honor. Did you sign some slips for receipt of lumber, Mr. Mercille, at the job yard?

A. I think I signed a few; there was nobody there. [845]

Q. Yes, sir; you were part of the Concrete Construction Company organization which came from Portland, were you not?

A. I was working for Concrete Construction Company.

Q. You had been previously working for the Concrete Construction down there in Portland?

A. Yes, I was working there in Portland.

Q. And you came up—— A. Yes.

Q. ——to this job—— A. Yes.

Q. ——as you say, on March 15. Now, are you still working with the Concrete Construction?

A. No.

Q. I believe you said you lived at Chewelah now?

A. Yes.

Q. You were on the job and saw all of the lumber which was delivered at the job yard through the whole of the performance of 1062, were you not? A. Yes.

Q. Can you now remember approximately the quantity of lumber in board feet? A. I don't.

Q. Had you before you came to 1062 worked on reclamation project forms before? [846]

A. Never.

Q. In other words, it was a new experience with you, on reclamation forms? A. Yes.

(Testimony of A. E. Mercille.)

Q. In any concrete form building is the practice to use the lumber but once, or use it frequently?

A. You could use it different times, if it's good to use.

Q. Yes, sir, as long as it is adaptable for a form requirement, it is expected, is it not, that it will be used again and again?

A. Yes, as long as the lumber is good.

Q. That's right, sir, and that is particularly true, is it not, with respect to the veneer lining for the forms, so that the concrete will have a smooth surface, correct?

A. I didn't hear that.

Q. Will you read the question?

(Whereupon, the reporter read the last previous question.)

A. Yes.

Q. And in the use of veneer it is usual, is it not, to patch it and re-use it?

A. Yes, when it's good enough you could patch some of them.

Q. And it is usual, is it not, to cover any breaks that come in the face of veneer, so that it can be used again, rather than discarded? [847]

A. Well, if you're able to use it; some of it was bad enough that you couldn't use it.

Q. Yes, I understand, when it gets to the point in the opinion of the man who's making the forms that it is no longer usable, then it is discarded, right?

A. Yes, sir.

(Testimony of A. E. Mercille.)

Q. But when it can be patched to be adaptable for forms, it is usually used, is it not; it is expected, isn't it? A. It is used again.

Q. Yes, if it could be used.

A. Yes, if it is good enough you could use it.

Q. All right, sir, and that's so also for the ship-lap and for the two by fours, is it not?

A. Yes, you could use it again if it is in good shape.

Q. Now, isn't it a fact, Mr. Mercille, that in almost every instance, when a structure form had been built and then assembled in the excavation, that before it could be used for another structure it had to go back to the shop to be re-cast to fit the next structure?

A. Yes, but there is some of it——

Q. Never mind the "but"; is that true?

A. If it is the right measurement of the next structure you could use it again.

Q. If it isn't, it has to be re-cast?

A. Yes, but there is lots of it fit the next structure. [848]

Q. If it fit, it doesn't have to be re-cast, but it has to be cleaned up, doesn't it? A. Yes.

Q. Was that your job? A. Yes.

Q. And if it was not the same shape of structure, and same dimensions, it had to be changed, didn't it? A. Yes, it had to be changed.

Q. And that was your job, wasn't it?

A. Yes.

(Testimony of A. E. Mercille.)

Q. Now, did you build the roof out of ship-lap that Maceri furnished?

A. I helped on it, but not very much.

Q. All right, sir; how much was used for that purpose?

A. I don't know.

Q. And it was taken down afterwards, was it not?

A. Yes.

Q. What became of it?

A. We used it for the structures.

Q. It had nail holes in it, did it not?

A. Yes, but it was——

Q. Never mind the "but"; it had nail holes, didn't it?

A. Yes.

Q. And it had tar stains in it, didn't it?

A. We never used no tar. [849]

Q. No covering on it?

A. There was covering.

Q. What kind of covering did you use?

A. Paper.

Q. Tar paper?

A. No, that was building paper, black paper, it was no tar, and we never used no nails on it; we put strip on it so we would be able to use it without damaging it.

Q. Were you there when the lumber was used as a brace for the Mixomobile?

A. Yes.

Q. What kind of lumber was used there?

A. Four by six and four by four; we cut just a few of them to block the mixer.

Q. What quantity of lumber?

A. I don't know; I never kept track of it. I wasn't the concrete man.

(Testimony of A. E. Mercille.)

Q. And those were dimensions sent for the purpose of building forms?

A. No, I don't think so, because we never used four by six.

Q. Were they part of the lumber ordered?

A. No, they didn't belong to that job at all. They were all for some other purpose. They were only blocking that we gave to the mixer men to repair at that time.

Q. Now, if it has been told me that after that was used for [850] blocking the mixer, then it later went into forms, that would be error, wouldn't it?

Mr. Olson: If the Court please, that's argumentative.

The Court: I think it is. I'll sustain the objection.

Q. You say that that lumber cannot be used for forms, correct, that lumber that went under the Mixomobile couldn't be used for forms; it was for some other purpose, is that correct? A. Yes.

Q. And to your knowledge it was not used in forms, correct? A. Yes.

Q. What was it used for, sir?

A. For the mixer.

Q. Yes; after you took the mixer down off it, then what was it used for?

A. I don't know what they used it for.

Q. It was used, wasn't it?

A. I don't know.

Q. And you don't know the quantity of that?

(Testimony of A. E. Mercille.)

A. No, I never measured it up. I had nothing to do with what they were doing with the mixer.

Q. Now, I'll ask you if when the mixer was up on that form lumber, that lumber, that Mr. Macri didn't protest to [851] you that was a mis-use of the lumber furnished for that purpose?

A. I don't know.

Q. Didn't Macri talk to you and tell you you should go get cord-wood or something cheaper for that purpose?

A. He never say no such a thing to me.

Q. All right, sir. Now, it is a fact, isn't it, Mr. Mercille, that frequently you alone at the yard would load on to the truck a panel, all alone?

A. Not all alone; some of the men helped me when I could not put them in alone.

Q. You say you never loaded alone?

A. Oh, I might load a few.

Q. And do you say that you have never loaded the sides and the bottoms, including the veneer surfacing, alone on to the truck?

A. I might load some of it; not all of them.

Q. Yes, sir. Now, it is more than a one man job, isn't it?

A. That all depends what kind of truck you got and what kind of conditions you got to put them in the truck.

Q. I'm talking about the jobs you loaded, was more than a one man job?

A. Well, lots of times the carpenters in the yard helped.

(Testimony of A. E. Mercille.)

Q. But you did load a good many yourself?

A. I loaded a few. [852]

Q. And you loaded it and took it out to the job, didn't you? A. Yes.

Q. Now, in loading it by yourself was there any chance that you might have chipped the veneer?

A. No, I never chipped no veneer.

Q. You said, I believe, on direct examination, that you saw a truck attached to pull out a form, didn't you?

A. I say I pulled some myself.

Q. Oh, yes; when? A. During the job.

Q. What time during the job?

A. On several times.

Q. When did you first do that, sir?

A. I never put the date down.

Q. When did you first do that with respect to the first pouring of concrete?

A. I don't remember which day.

Q. Was it before or after the concrete had been poured?

A. Well, it was certainly after the concrete was poured.

Q. Yes, sir; now, was there any such operation in April? A. I can't recall it.

Q. You do not recall any. What was an average day's output of form construction by you; how many did you put out?

A. I don't know, you generally work a couple of men together, and if we had the right kind of lumber for to finish one [853] form, we could do quite a few in one day.

(Testimony of A. E. Mercille.)

Q. Isn't it a fact, Mr. Mercille, that the veneer facing is the essential, necessary part that must be correct so that your finished concrete will be smooth; that's right, isn't it? A. Yes.

Q. Now, isn't it also a fact that the outer wall of the form, or the outer panel of the form, does not touch the concrete at all? Is that right?

Mr. Olson: How could that be?

A. What do you mean?

Q. Because it is lined with veneer, is how it could be. Is that right? Every place that your concrete goes in is faced with veneer, is it not?

A. No, sir.

Q. Sir? A. No, there's ship-lap.

Q. Isn't there a veneer lining, sir, to the panel?

A. No, that ship-lap on the outside.

Q. Sir? A. Ship-lap.

The Court: He said ship-lap on the outside.

Q. Yes, outside; but where the concrete touches?

The Court: No, he means the outside form.

Q. Do you mean on the outside of the outside form? I'm [854] talking about the inside of the outside form. Is that lined, or not?

A. That's ship-lap.

Q. It isn't lined with veneer?

A. Not all of them. Where the box is, that's veneer, and the outside wall, that ship-lap.

Q. The inside of the box is lined with veneer, the outside of the box is up against the ship-lap, is it?

(Testimony of A. E. Mercille.)

A. That depends on the different structures. That box, there, that's veneer, and the outside is ship-lap.

Q. But the concrete goes against the ship-lap?

A. On the inside, the veneer, and the outside, the ship-lap.

Q. Then the outside of the concrete structure will be up against the ship-lap, right?

A. I don't get you there.

Q. Well, if you're going to build a wall in these structures, the inside, as you call it, the inside of the box, will be faced with veneer, will it not?

A. Veneer.

Q. All right. Now, the outside wall which holds the concrete up against the veneer?

A. That's ship-lap.

Q. That's ship-lap, and then the outer wall will be right tight against ship-lap, and will not be lined with veneer, is that right? [855]

A. No, there's no veneer there.

Q. Also it is a fact, is it not, that after the structure is completed and the forms removed, those outside walls of the concrete structure will be rough, as against the inside, which will be smooth?

A. Yes.

Q. Because the outside does not touch water, does it; the water's all on the inside, right?

A. Yes.

Q. Now, do you say that you had two by fours which fell into three pieces when you handled them?

A. Yes.

(Testimony of A. E. Mercille.)

Q. You didn't use those, did you, sir?

A. We used it for different places, sometimes.

Q. You would cut out the knot breaks, or whatever it was, and use them somewhere else?

A. Yes.

Q. You knew as a practical proposition that at that time there was a great national shortage of lumber, did you not? A. Yes.

Q. And you knew you had to have priority to get any lumber, did you not? A. Yes.

Q. And you knew the type of lumber was just what you could [856] get, and that's all?

Mr. Olson: That's immaterial; whether or not Mr. Mercille knew it was hard to get would be immaterial.

The Court: Sustain the objection.

Mr. Holman: I'm talking about the conservation of lumber.

The Court: What is the materiality of it here, Mr. Holman?

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you take a man with you when you delivered forms out on the excavations?

A. Lots of times I took a man with me.

Q. When the forms were there did you set them in, or was there a crew there to set them in?

A. There was a crew there to set them in.

Q. In other words, that was not part of your functioning? A. No.

(Testimony of A. E. Mercille.)

Q. Isn't it a fact that so far as lumber from 1068 is concerned, that that job at that time was not operating, and that there was a different yard, job-yard, for 1068 than for 1062, right? A. Yes.

Q. And that you went to 1068 under arrangement with Macri's superintendent to get lumber?

A. Yes. [857]

Q. And borrowed the lumber from 1068 on to 1062? A. Yes.

Q. What quantity?

A. I hauled five load of it. I don't know; I never measured it up. The foreman was there, and he told me to only load so much. He say "We need that lumber here."

Q. Five loads in how many days?

A. Oh, I don't know how many days. I went there five different times.

Q. All right, five different days, then, sir?

A. Yes.

Q. All right; and how far did you drive?

A. To go over there?

Q. Yes.

A. I don't know; I guess it was five or six miles.

Q. Five miles, it would be fair to call it, would it?

A. I think it was more than five miles. I never measured the distance.

Q. Would six be fair?

A. Well, six or seven miles, anyway.

Q. Would seven be fair, sir?

A. I think so.

(Testimony of A. E. Mercille.)

Q. Seven would be fair to Mr. Schaefer, to call it seven?

A. I never measured the mileage. I don't know, I just went to get the lumber. [858]

Q. And the truck, of course, was operated by you? A. Yes.

Q. Did you have a man with you? A. No.

Q. Alone; all right.

A. We had Mr. Macri's foreman, sometime, or superintendent.

Q. Yes, but I'm talking about Schaefer just had you? A. Just had me, yes.

Q. And how long would it take you to get a load from 1068 yard and carry it to 1062 yard?

A. How long it take?

Q. Yes.

A. That all depends on how much time I had to spend there. Mr. Macri's foreman just wanted me to take the rotten lumber, just take the pile and load.

Q. Which foreman was that?

A. Oh, there was a foreman on 1068.

Q. What was his name?

A. I don't know his name. I had an order from the foreman on 1062 to get lumber, because we didn't have any, and everybody was standing up in the yard.

Q. Well, how long did it take you to get that load of lumber and get it back to 1062?

A. Oh, two or three hours.

(Testimony of A. E. Mercille.)

Q. Would three hours per load for the five loads be fair? [859]

A. Three hours for the five loads? No.

Q. No, for each of the five loads?

A. Well, it would be three or four hours, because I had to wait.

Q. Well, you said three to four, sir. Is four hours fair, per load? A. Yes.

Q. All right, sir. Did you make any statement of the time, your time and the use of the truck, for that transfer? A. No.

Q. Did you report it to Mr. Darcy?

A. I don't know if Mr. Darcy made any. He was the superintendent of the job.

Q. I said did you report it to Mr. Darcy?

A. He knowed I was over there and got the lumber.

Q. Mr. Mercille, will you tell me whether you reported it to him or not?

A. Well, sometime he asked me if I got the lumber or not; I said yes. He saw it himself, there was nothing in the yard.

Q. I don't want to argue with you. I want to know if you gave Mr. Darcy a memorandum of the quantity of lumber you got, and when you got it, and where? A. No.

Q. Had you been a carpenter on building concrete work in [860] Portland before you came here?

A. Yes.

Q. How long? A. About since 1940.

Q. Since 1940; that would be about four years, then, before you came here, right? A. Yes.

(Testimony of A. E. Mercille.)

Q. Now, was this additional foreman, carpenter foreman, whose name I directed your attention to a while ago, a Portland man working with you down there? A. What was his name?

Q. Well, one was Klugg, and the other man's name you gave me.

A. No, there was no——

Q. You were the only carpenter who came from Portland, were you, sir?

A. There was another carpenter there from Portland.

Q. What was his name?

A. George Shuler.

Q. You and George Shuler were the two who had worked for the Concrete Construction and came from Portland? A. Yes.

Mr. Holman: All right; thank you, sir. That's all.

The Court: All right, Mr. Hawkins.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Mercille, on direct examination I believe you testified that some of the excavations were out of line, is that correct? A. Yes.

Q. And did you measure those yourself——

A. No.

Q. To ascertain that fact? Mr. Klugg did?

A. Yes.

Q. And he told you at that time that they were out of line? A. Yes.

(Testimony of A. E. Mercille.)

Q. And that's the reason you know now that they were out of line? A. Yes.

Mr. Hawkins: Your Honor, I move that that testimony of his on direct examination concerning the alignment of these excavations be stricken. It is obviously hearsay.

Mr. Holman: I join.

Mr. Olson: He testified directly to conversation and statements made in Mr. Macri's presence when they were out there inspecting these excavations with Mr. Macri and pointing these things out to Mr. Macri. It's what was said in Mr. Macri's presence.

Mr. Hawkins: That's no proof that those are the facts. [862]

The Court: It would be admissible if it were a statement made to Mr. Macri, in his presence.

Mr. Hawkins: His testimony was that Mr. Klugg told him that.

The Court: His testimony now, as I remember it, on direct, is he said it was his conversation with Mr. Macri. I'll deny the motion to strike.

Mr. Hawkins: I object to the testimony's admission for any purpose other than to show that statement was made to Mr. Macri. I do not think they are competent evidence that such fact existed.

The Court: I don't remember definitely whether he made any statement directly that the structures were out of line. If he did, that will be stricken or disregarded, but the part of his testimony had

(Testimony of A. E. Mercille.)

with Mr. Macri and in Mr. Macri's presence, as to the condition of the structures, and whether they were in line, will not be stricken. Proceed.

Cross-Examination
(Continued)

By Mr. Hawkins:

Q. Did you have anything to do with the setting of the forms in the excavations? A. No.

Q. Did you have anything to do with the pouring of the concrete in the forms? A. No. [863]

Mr. Hawkins: That's all.

Mr. Ivy: No questions.

Mr. Olson: That's all. May Mr. Mercille be excused?

Mr. Hawkins: We have no objection.

Mr. Holman: Not at all.

(Whereupon, there being no further questions, the witness was excused.)

C. E. HEWITT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. C. E. Hewitt.

Q. And what is your occupation?

A. Civil Engineer.

(Testimony of C. E. Hewitt.)

Q. How long have you been a civil engineer?

A. Oh, about forty or fifty years; since I graduated.

Q. And where do you live? A. Yakima.

Q. And where have you practiced your profession of civil engineering?

A. Well, I have practiced in a number of the states, most of the central states, and——

Q. Well, how long have you been here in Yakima, Mr. Hewitt?

A. Thirty-five years; thirty-seven years, in fact.

Q. And during all of that time have you been engaged in the practice of your profession?

A. Yes.

Q. And are you now a duly licensed and practicing civil engineer in Yakima County, Washington? A. Yes.

Q. Now, Mr. Hewitt, did you at the request of Mr. Schaefer or his representatives inspect some of the excavations on project 1062 of the Bureau of Reclamation, near Sunnyside? A. Yes.

Q. Do you remember approximately the month when that was done?

A. That was done February, 1945.

Q. At that time were the excavations filled with a concrete structure. A. I didn't get that.

Q. Were the excavations filled or did they contain a concrete structure, at that time?

A. Concrete structure; the structure was in.

Q. Were the structures in? That's what I'm trying to get at. A. Yes.

(Testimony of C. E. Hewitt.)

Q. Did you at the request of Mr. Schaefer or his representatives make a diagram or chart showing the clearance between the structure and the bank, and also the slope of the bank? [865]

A. Yes.

Q. And do you have that with you?

A. Yes.

(Whereupon, the chart of structure excavation, by Hewitt, was marked Plaintiff's Exhibit No. 60 for identification.)

Q. Did you examine each of the structures on 1062, Mr. Hewitt?

A. No, I don't think all of them. Some were back filled, and you couldn't get the data that you wanted.

Q. Now, handing you plaintiff's identification 60, Mr. Hewitt, is that the chart which you prepared?

A. Yes, this is a cross section.

Q. That is a cross section chart?

A. This is a cross section of the structures as they were, showing the excavation at the side of the structure.

Q. Now, in making this chart, Mr. Hewitt, did you take—or just what did you do with reference to deciding what excavations to make a chart of?

A. Just took the measurements on the ground with reference to the structure that was in, and the banks of the excavation as it was on the ground.

Q. Well, was there anybody with you from the Concrete Construction Company when you took

(Testimony of C. E. Hewitt.)

these measurements on 1062, telling you which structure to pick out? [866] A. No.

Q. What did you do in that regard, then?

A. I took the structures just as they came, from where we started down as far as we could get. The structures that were available there for measurement, I took all there were.

Q. All that were available for your measurements then? A. Yes.

Q. And has that data been by you put on to this graph and chart? A. Yes.

Q. What does it show, Mr. Hewitt? Not asking to the result, but what does it show with reference to the bank itself?

A. It shows the location of the bank with reference to what the bank would have been if it had been on a slope of one to one.

Q. And does it also show lateral clearance from the neat line of the concrete structure?

Mr. Olson: We offer this chart in evidence, being plaintiff's identification 60.

Mr. Holman: Let's take a look, if we may, your Honor. Is there a legend on this?

Mr. Olson: No. I'll go into that. It ties in [867] with the documents that are in evidence. I perhaps had better do that.

Mr. Holman: I wonder if you would?

Q. Mr. Hewitt, on the top of each one of these diagrams appears the words "page 69A" "page 68A" and so forth. What does that refer to?

A. It refers to the page of the plans of the Reclamation Bureau.

(Testimony of C. E. Hewitt.)

Q. And by that do you refer to the document which I now hand you, plaintiff's Exhibit 12?

A. Yes.

Q. As I understand it, then, the page number that is on identification 60 refers to the page number of the structure lay-out plan, Exhibit 12?

A. Yes.

Q. And there is also a structure number here, or a number here, 470, for instance, and 471, 463; what do these refer to, and similar numbers?

A. Those refer to numbers on the plans also, the same plan that the page refers to. These numbers will be found on the page that is given on there.

Q. Do they then identify a specific structure on the page indicated? A. Yes.

Q. So that by reference to that number you can turn the page [868] and find the exact structure to which that document refers? A. Yes.

Q. Then you have some notations here of "L" equals a certain number. What does that mean?

A. That's the length of the structure or the length of the excavation that was being considered, that particular wall.

Q. There is an arrow that ties in that "L equals so and so," to a certain blue line. Does that indicate that that length is the length of that particular bank? A. Yes.

Mr. Olson: Now, we offer the identification.

Mr. Holman: As illustrative of this witness' testimony?

(Testimony of C. E. Hewitt.)

Mr. Olson: No, I'm offering it not only as illustrative of his testimony, but showing his findings as a civil engineer of this job. I'm not limiting it to illustrative purposes.

Mr. Holman: I object, your Honor, for the reason that it has not yet been explained as to the details on it, for instance, blue lines, red lines.

Mr. Olson: Well, I'm happy to ask him that.

Mr. Holman: He hasn't explained that. What are they?

The Court: Is this a scale map? I assume it is.

Mr. Olson: Yes, your Honor.

The Court: The scale isn't indicated on it.

Witness: The scale is one inch to the foot. That's cross section paper. It is laid off in inch square, and those squares are one foot.

The Court: Is there anything else, perhaps you had better go into it before you renew your offer.

Mr. Olson: I was apparently unjustifiably anticipating an objection that the document wasn't in evidence.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hewitt, will you explain the vertical red line on each diagram, as to what it indicates?

A. It indicates the neat line of the structure that was in place, of the concrete.

Q. Then, taking each diagram as you have marked off with the blue wavy line at the bottom

(Testimony of C. E. Hewitt.)

or base of that cross section, there is a horizontal red line. What does that indicate?

A. It indicates the distance one foot back, or what was required in the specifications for the excavation.

Mr. Hawkins: I move that that part of the answer be stricken.

Mr. Holman: I join.

The Court: As to what is required in the [870] specifications?

Mr. Holman: Yes; it is this witness' interpretation of the specifications.

The Court: I don't think it has been shown that he examined the specifications, has it?

Direct Examination
(Continued)

By Mr. Olson:

Q. Did you examine the specifications.

A. I did.

Q. And is that answer which you just gave related to the specifications as you interpreted them?

A. Yes.

Mr. Hawkins: Your Honor, I've examined the specifications, and I have not yet found anything that requires the excavation to be one foot from the structure line, and one to one slope.

The Court: You mean in the sub-contract?

Mr. Hawkins: In the sub-contract and in the specifications themselves.

(Testimony of C. E. Hewitt.)

Mr. Olson: Well, I'll be happy to show it to counsel if you'll give me the specifications.

The Court: The thing I'm thinking about here, ordinarily I don't think it would be proper for a witness to testify as to what he regards the specifications to be, but this is a thought I have; an engineer, as an expert, would be capable of reading specifications and [871] drawing them out on the ground, and he could testify to that, I should think.

Q. Now, Mr. Hewitt, I hand you plaintiff's Exhibit 3, which contains, among others, this notation "Except for the limitation——

Mr. Holman: Just a minute. I submit counsel shouldn't answer for this witness.

The Court: He hasn't asked the question.

Mr. Holman: He's starting to read.

The Court: He's calling his attention to it.

Q. "Except for the limitation described above, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the foundation of the structure and to a slope of 1 to 1 for common excavation."

Is that the portion of the specifications to which you were referring?

A. That was my understanding of what it was.

Mr. Hawkins: Well, that's just exactly the answer to which I object. Counsel's been reading from a portion of paragraph 47, on page 22 and 23 of the specifications.

(Testimony of C. E. Hewitt.)

Mr. Holman: You will be two numbers short on the opposite one, your Honor, if that is 1068. It will be two numbers less, as I recall. I think it would be 45 there, your Honor.

The Court: Yes, I see it here. [872]

Mr. Hawkins: "The items on the schedule for excavations for structures include (reading from Exhibit 3). That, your Honor, I contend is the only provision in the specifications relating to excavation as such. What follows relates solely to the method of determining what the excavation contractor is going to be paid. Now, your Honor, there is not one word in these specifications whatsoever that requires that the excavation be a one foot lateral clearance plus a one to one slope. That formula is set forth here solely for determining the method of payment. In other words, if the contractor wants to excavate four or five feet on the side, he's not going to be paid for that. There is not one word in there that requires any slope to be imposed on these banks, and if the witness' diagram is based on this provision with respect to payment. I submit it is not admissible."

The Court: Well, there isn't any provision in that for clearance of any kind?

Mr. Hawkins: Just whatever in common practice is a reasonable clearance, in other words, the required excavation. In other words, if a one foot lateral clearance is sufficient for all normal operations, then that's all they're entitled to, and it is not a mathematical proposition of one foot out

(Testimony of C. E. Hewitt.)

and a one to one slope up that they're entitled to as a matter of law. [873] They're entitled to no such thing under these specifications.

Mr. Olson: If your Honor please, it is a unique argument to say "That's what they're paying for, but we didn't have to do that for which the government was paying." Certainly we're entitled to put this witness on the stand and to compare the slope on these banks as they existed to what it would have been on a one to one slope which Macri was paid for. I'm going to put a witness on the stand to show every one was paid for on a one to one slope.

Mr. Hawkins: I don't know about that. All I know is that one of the witnesses attempted to testify the method of payment was changed to vertical slope. Counsel objected to it on the ground all we were concerned with was the specifications and the interpretation to be placed on them by the Court.

The Court: I'll permit him to testify with reference to what they were with reference to what they would have been on a one to one slope, and we'll determine what the specifications are afterwards.

Mr. Holman: Your Honor, I join in Mr. Hawkins' objection.

The Court: The record may show that objection was made by both sides. The bonding company too, if they [874] wish.

Mr. Ivy: I understood earlier that the objection of one would carry the objection of all.

The Court: I think the record shows that.

(Testimony of C. E. Hewitt.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Did you testify to what the scale was on this?

A. One foot to the inch. One inch on the paper represents one foot on the ground.

Q. All right; now, each of these little squares, the map seems to be divided up into larger squares and smaller squares; the smaller squares indicate what distance? A. One-tenth of a foot.

Mr. Holman: Those are the smallest?

A. The largest, on the heavier line, is one inch, and the inches are divided into ten parts on the metric scale; not inches, but tenths.

Q. That was that tenth they talk about?

A. Instead of twelve inches to a foot, there is ten tenths to a foot, and these inches are divided into ten equal parts.

Q. Now, the horizontal red line to the right of each of these structure diagrams indicates what?

A. It indicates the slope of one to one.

Q. That's a one to one slope? A. Yes.

Q. Now, the blue lines indicate what?

A. Indicates the banks as it was.

Q. I mean the blue straight lines.

A. The blue straight line, vertical, or nearly vertical, is the side of the bank, and the blue at the top was the top of the bank, so that the distance, the area between the red line and the two blue lines, is the area of the section that according

(Testimony of C. E. Hewitt.)

to my interpretation of the specifications would have been excavated had they been excavated according to the specifications, and the blue line showed where they were actually.

Q. Now, Mr. Hewitt, with reference to the depth of each one of these excavations, does that appear on the map? A. Yes.

Q. And that's indicated how?

A. By a red line at the bottom of the excavation.

Q. That's the depth; in other words, that is the floor or the base? A. The base, yes.

Q. Now, how can you tell from that how deep or how far from the bottom of that hole it is up to the top, by looking at this map, as it actually was?

A. Well, it indicates by the square, so many feet and tenths of a foot, as shown on the cross section.

Q. In other words, is the depth, then, of these excavations [876] shown on the same scale on this map? A. Yes.

Q. So that by taking from the horizontal red line at the base of each diagram, going towards the top of the page on the blue line, and by using the scale, you can tell how deep that particular excavation is? A. Yes.

Mr. Olson: Now, we re-offer plaintiff's identification 60.

Mr. Hawkins: Your Honor, may I ask one or two questions of the witness?

The Court: All right.

(Testimony of C. E. Hewitt.)

Voir Dire Examination

By Mr. Hawkins:

Q. How many structures are evidenced on your exhibit? A. I couldn't say

Q. Could you count them and tell?

A. How's that?

Q. Could you count them and tell?

A. They could be counted, I guess.

Mr. Olson: Can you give us an approximation, Mr Hewitt?

A. In these structures where there was two or three compartments in a structure, why, they have different numbers. That is, if there is a concrete structure where it was an entrance for the water, the main part, and then it turned [877] out at one side, and turned out at the other side, those have different numbers, so that one structure on the ground may have two or three different numbers, indicating different parts of that what might be considered one structure; that is, it's in one place, but the structure has different numbers.

Voir Dire Examination

(Continued)

By Mr. Hawkins:

Q. You can't tell from that exhibit how many structures have been measured.

A. Yes, I think you can, or could, but I don't think I ever have.

(Testimony of C. E. Hewitt.)

Q. Does each one of those blue lines represent a separate structure?

A. I didn't get that.

Q. I say, does each one of those blue lines represent a separate structure?

A. No, they don't represent—they represent different parts of the excavation.

Q. Different slopes on the same excavation?

A. Yes, different walls; there would be one on one side, and maybe two or three sides on one structure

Q. How many different excavations, then, did you examine in making up this map or chart?

A. Well, I couldn't say. I've never counted them.

Q. Well, with reference to this exhibit, take this particular [878] square headed by page 68-A, does that represent—that entire section surrounded by the wavy blue line, represent just one excavation?

A. No, each one of these represents an excavation.

Q. Represents one excavation?

A. Yes, this represents one excavation, and this is another one

Q. And this is the third? A. Yes.

Q. So that this wavy line headed "page 68-A" represents three separate excavations.

A. Represents that page.

Q. Yes, but it also represents three separate excavations. Isn't that right, or not?

(Testimony of C. E. Hewitt.)

A. Well, I don't know; there is in that one four different ones in there.

Q. There is four different ones in here headed by page 68-A?

A. No, this is a different page.

Q. Just take this portion of your chart headed "page 68-A." Can you tell us how many excavations are represented by those drawings?

A. Well, I think it is three excavations.

Q. You think it is three excavations? How could you tell?

A. By these numbers that refer to here.

Q. What numbers? [879]

A. These numbers—447.

Q. And how about this one, 468? Does that represent an entirely different excavation?

A. Not necessarily.

Q. Not necessarily?

A. No, not necessarily.

Mr. Hawkins: Your Honor, I submit that exhibit is not properly qualified to be admitted in evidence. We don't know what it represents.

The Court: Do you have any questions?

Mr. Holman: I wanted to ask a question or two, if I may.

Q. (By Mr. Holman): Did you have field notes, Mr. Hewitt?

A. Beg pardon.

Q. Did you have field notes?

A. No, I had those plans.

(Testimony of C. E. Hewitt.)

Q. Did you make field notes, Mr. Hewitt?

A. Yes, I made the measurements.

Q. Where are your field notes?

A. Well, they're in those files.

Q. Will you produce your field notes, please?

A. They're there in the record.

Q. Well, they weren't in this, because I had this introduced. Where are your field notes? [880]

Mr. Olson: Well, I can get them, your Honor, here.

Mr. Holman: Will you, please?

The Court: Are they here in the courtroom?

Mr. Olson: I think so.

Mr. Holman: I'd like to have them.

Mr. Olson: Are these your field notes, Mr. Hewitt?

The Court: Let him look at them, and he can tell.

Witness: Yes.

Q. (By Mr. Holman): You say that you prepared these field notes?

A. Those are the plans that I took the notes of.

Q. Now, the fact is, with reference to Macri's Exhibit 12, you have secured from the Bureau another set of plans of structures as represented by 12, have you not?

A. I don't know what 12 is.

Q. You're holding it right here, sir. That's right, is it not?

A. I don't know whether this is the same as that or not, but I got these plans from the Reclamation Bureau.

(Testimony of C. E. Hewitt.)

Q. Yes, sir; all right. Now, in order to clear the record, you see on 12, "Specifications 1062, structure lay-out," and you see on yours "Specifications 1062, structure lay-out"? A. Yes.

Q. Do you see the other wording below? It is the same on [881] both, is it not? A. Yes.

Q. You said you did get plans from the Bureau, and those are the plans you used in the field?

A. Yes, sir.

Q. Now, the markings which are foreign to the printed matter, let's say, the blue printed matter, are matters which you put on as a result of your field investigation, is that correct?

A. That's correct.

Q. Then this which you have indicated as your field notes is your record of original entries, correct? A. Yes.

Q. And plaintiff's identification 60 is your graph that you have built from your field notes, correct?

A. That's right.

Q. Then is there anything in 60 except illustrations of what you have already adapted in your field notes?

A. I don't think I get your question.

Q. Is there anything in 60 except what you have already indicated in your field notes?

A. No.

Q. In other words, then, 60 is for the purpose of emphasizing those things which do not show upon the government records, is that correct? [882]

(Testimony of C. E. Hewitt.)

Mr. Olson: That's objected to, if the Court please, asking for a conclusion of this witness, asking what the proof is.

The Court: I'll sustain the objection, and go back to your counsel table, Mr. Holman, except when you need to call the witness' attention to something.

Q. Yes, sir. Are these particular structures which are contained in the book your counsel furnished me the only ones you looked at?

A. The only ones that I have measurements on.

Q. Now, you made your computations also on this blue print reproduction of structures, did you not; you made your computations also upon this?

Mr. Olson: I don't think that is proper, your Honor, for the purpose of identifying this exhibit, what all he did on these field notes. I'm not offering the field notes.

The Court: We're just inquiring into whether or not this is admissible in evidence, of course, Mr. Holman.

Q. That's correct, your Honor, but what I would like to know is whether or not in addition to this which counsel has handed me, you actually made any note entries in the field. Did you make them right on these photostats or blue prints?

A. Yes, upon those or others that I had. [883]

Q. Did you make them in the field at the time, sir?

A. Yes.

Q. Then these are original entries, in reading here?

A. Yes.

(Testimony of C. E. Hewitt.)

Q. Now, could you get one structure there off of 60 that one could identify on your field notes? Take this particular one counsel was talking about, 68-A.

A. That doesn't seem to be here.

Q. Can you pick one up that does?

A. Here's page 45.

The Court: This pamphlet that you're holding in your hand, that bound document, that is not all of your field notes, Mr. Hewitt?

A. I was under the impression that they were all here, but there may be some pages that are missing.

Q. I find, Mr. Hewitt, 39, 40, 41, 42; you want 43, did you say?

A. Well, 45.

Q. Here's 45, is it not?

The Court: Well, is there a question propounded to this witness now?

Mr. Holman: Yes.

The Court: What is it?

Mr. Holman: I'm asking now with reference to 45. He selected page 45 as the portion of the structure as [884] shown by the blue prints that shows on 60.

A. Whatever number the structure is, the structure is numbered here, which is the same number that is given on the blue print, and the page, and that number 294 would be the number of the structure.

Q. Mr. Hewitt, isn't it a fact, or is it a fact, that the only portion of the structure as shown on page 45 which you have reproduced is the upright wall?

A. Yes, the upright wall.

(Testimony of C. E. Hewitt.)

Q. And the rest of it you don't show?

A. No.

Q. That's what I wanted to get at; and if it is a box structure, you don't show the whole box?

A. No.

Q. In other words, 60 is particularly for the purpose of showing elevations of the excavation, and excavation at the base of the structure?

A. Particularly showing the difference between the excavation as it was and what I understood it should be according to the specifications.

Mr. Holman: Well, I submit, your Honor, that the exhibit is purely argumentative in nature, and is based upon the engineer's interpretation of the plans of the specifications, as distinguished from the drawings as controlling for the job, shown by Macri's Exhibit 12. [885]

The Court: Any further objection to this document, this exhibit?

Mr. Hawkins: No further objection except the one that I have made already, that——

The Court: Well, let's not repeat that.

Mr. Hawkins: ——that the document is meaningless as far as I'm concerned.

The Court: The objections will be overruled. It will be admitted.

(Whereupon, plaintiff's Exhibit No. 60 for identification was admitted in evidence.)

(Testimony of C. E. Hewitt.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Hewitt, at the time you took these measurements, you said that the concrete structures were already in place? A. Yes.

Q. So that as far as the grade, or the sub-elevations of the excavations, they were covered with concrete, I take it?

A. On the plans there is an elevation given for the invert, or the finished concrete; then there was the thickness of the bottom and also an elevation for the top of the wall, and it was from those elevations that I calculated what the bottom of the excavation was to be.

Q. Now, showing you picture number 56, which is a part of [886] plaintiff's Exhibit 49, and I'll ask you if you recognize the gentleman shown in that picture alongside of that structure?

A. Yes.

Q. And who is it? A. That is myself.

Q. All right; then on that picture there is a white ruler of some kind reaching from the concrete structure horizontally out on top of the surface of the ground. Can you explain what that is intended to show, if you know?

A. It was to show the distance out of the excavation, where the excavation would have been had it been on a slope of one to one.

(Testimony of C. E. Hewitt.)

Q. Now, one more question, is that picture a fair reproduction of the condition of the bank and the lateral clearance as it existed there the day that picture was taken? A. I think so.

The Court: What picture is that?

Q. That's 56, your Honor, of Exhibit 49. Now, drawing your attention, Mr. Hewitt, to picture number 67 of Exhibit 49, apparently taken on the same day, February 9, 1945, also showing a white ruler or measurement extending horizontally on the top of the ground out to a stake, were you also present when that was taken? A. Yes, I was.

Q. And what does that indicate, that white line out to a stake from the concrete structure?

A. That is a six-foot rule, and the outer end of it is out to the distance that the bank would have been had it been on a slope of one to one.

Q. And is the bank as shown there, and the lateral clearance as shown there, a fair reproduction of the way that one was on that date?

A. Yes.

Q. Now, with reference to the lateral clearance and the bank shown in those two pictures, how do they illustrate, if they do, the general situation with reference to the banks and slope or lack of slope on the bank as you examined them in taking your measurements?

A. That the banks were practically vertical, that it was just a cut back, and the dirt was standing about as steep as it could stand as they were in the

(Testimony of C. E. Hewitt.)

excavation, without any slope or attempt to make a slope of one to one.

Mr. Olson: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Hewitt, who engaged your services for the purpose of your field work?

A. Mr. Schaefer.

Q. And was February 9, 1945, the first time that you in your [888] professional capacity for Mr. Schaefer had gone into the field?

A. I think it was.

Q. And at that time you were accompanied by his attorney, Mr. McKelvey, were you not?

A. Yes, sir.

Q. And at that time you had understood that there was to be litigation in court, and that you were acting as court engineer for the project, is that right, sir?

Mr. Olson: Now, what is a court engineer, Mr. Holman?

A. No, I don't think that's right.

The Court: Yes, I don't know what it is.

Mr. Hawkins: I always thought that was an attorney, your Honor.

Q. Well, you were making your field preparation for the purpose of testifying in this lawsuit, were you not?

A. I didn't know what the results would be.

Q. Well, you knew you were preparing the information for the purpose of use in court, did you not, Mr. Hewitt?

(Testimony of C. E. Hewitt.)

A. I didn't know that it would come to a court case.

Q. What were your instructions as engineer?

A. To get the structures, the excavations, as they were, compared with the excavations as they would have been had they been according to the specifications as I [889] understood them.

Mr. Hawkins: We again object to that, and move that it be stricken, your Honor.

Mr. Holman: I'll join, your Honor.

The Court: It will be denied.

Q. You had no instructions to determine a practical bank with due relationship to the character of soil for any structure, did you, Mr. Hewitt?

Mr. Olson: That question is objected to, your Honor, as not being a proper question, as to whether or not he had been given any instructions to arrive at a "practical bank". Can't tell what the question means.

Q. Well, you're familiar with——

The Court: Just a moment; I'll overrule the objection.

Q. Did you hear the question, Mr. Hewitt?

A. I was not given any instruction to determine any practical bank.

Q. Yes, sir. You have had opportunities to inspect field excavations on the Roza Project, have you not, Mr. Hewitt, in your experience as an engineer?

A. That I have had of other places, you mean?

(Testimony of C. E. Hewitt.)

Q. Yes, I said opportunity to inspect excavations for structures on the Roza Project.

A. Oh, I've seen them, yes. [890]

Q. Yes, sir. Have you seen any excavation cut to a one to one slope, one foot out from the neat line of any structure excavation on the Roza Project?

Mr. Olson: That's objected to, your Honor, as being wholly immaterial, whether Mr. Hewitt has seen any such excavation on another part of the Bureau of Reclamation Project or not.

The Court: I'll sustain the objection. It will be the view of the Court, unless persuaded to the contrary, that it wouldn't be proper to go into other sections of the Roza contract. If we did that we would have to go into the contracts and subcontracts and specifications of those also. Sustained.

Q. Mr. Hewitt, were you allowed any latitude in your instructions inside of one to one slope, to determine for those drawings?

Mr. Olson: That's objected to, your Honor, in asking for a conclusion of this witness, was he allowed. Maybe I don't understand his question, but if he's asking what he was allowed——

The Court: Let's read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I object to the question.

Mr. Holman: I think the question is prolix, and I'll strike it [891]

(Testimony of C. E. Hewitt.)

Q. What I would like to know, Mr. Hewitt, is whether or not your instructions were to produce a one to one slope as a result of your field inspection, against what it was; was that your instruction?

A. I was given a copy of the specifications and asked to determine what the excavations were with reference to those specifications.

Q. Will you tell me, please, whether or not you were asked to produce a one to one slope in Exhibit 60?

A. I don't know that I was, any more than that was what I understood that the specifications called for.

Q. Yes, sir, and you were to produce a slope of one to one except in solid rock, and that would be at a quarter to one, would it not? A. Yes.

Q. By the way, did you find any?

A. Some places there was stone.

Q. Did you find any rock excavation?

A. Yes.

Q. Did you produce any, sir, upon your chart, 60?

A. I'm not sure whether there is any of those that shows on that or not.

Q. Did you make any field notation of any of the rock structures? [892] A. I don't recall.

Q. Now, a quarter to one slope is for all practical purposes virtually a perpendicular wall in a three foot hole, isn't it?

A. No, it is a quarter of the distance, a quarter of the depth. A quarter to one would be out at the top one quarter of the depth.

(Testimony of C. E. Hewitt.)

Q. Yes, sir, one quarter of the depth down in a three foot hole.

A. In a four foot hole it would be one foot out at the top.

Q. Yes, sir. You saw no such structures?

A. I saw some structures where it was rocky on one side.

Q. But you didn't reproduce those?

A. I think they were back about that slope.

Q. Did you inquire before going into the field from the Bureau of Reclamation as to its method of payment under specification 47, which was read to you, read to the Court, pardon me, by Mr. Hawkins?

A. I don't think I inquired any more than of the specifications.

Q. I asked you if you inquired of the Bureau as to the method of payment?

A. No, I don't think so.

Q. Did you compute the area between a one to one slope and the actual ground slope on any of these structures which [893] you have shown upon Exhibit 60?

Mr. Olson: That's objected to, your Honor, as being immaterial, what the area was, or whether this witness computed it or whether he did not.

The Court: I don't see the purpose of it, Mr. Holman.

Mr. Holman: My purpose, your Honor, is if this witness has gone out there to establish an arbi-

(Testimony of C. E. Hewitt.)

trary one to one slope on a drawing as against the actual wall he found, if he can give me the volume in there, then we can compute that volume.

Mr. Olson: What counsel is getting after, as I see it, is how much more excavation it would have taken if they had excavated to a one to one slope, I assume, to show we could have gone in and done this excavating, and how many more cubic yards of dirt we would have to remove to do it. That's the thing I'm objecting to, because there was no obligation on us to do it. Mr. Macri was supposed to do the excavating, not us. We show the slope of the banks; that's all I've got this witness for.

The Court: Do you have something further to say?

Mr. Holman: Yes, I've got this to say; if this witness is to be helpful in the determination of the amount of earth removed by Schaefer for the purpose of guidance of this Court, that's one thing; if he isn't, I [894] submit his entire testimony is just——

The Court: Well, there's no contention, as I understand it, that Mr. Schaefer excavated on a slope of one to one. He excavated only such amount as was necessary to put in the structure. That is as I understand his position. I'll sustain the objection.

(Testimony of C. E. Hewitt.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, I believe you said that on plaintiff's Exhibit 60 the red indicates the slope at one to one, and the blue indicates the actual excavation, correct? A. Yes.

Q. How did you determine the angle shown by the blue on 60?

A. By measurements out from the concrete structure.

Q. Yes, sir; you took the completed concrete structure with the form removed, did you not?

A. Yes.

Q. As the neat line or the basic line from which you would measure out? A. Yes.

Q. And how many measurements did you make in a cut on the way up, from the bottom to the top, from that base line?

A. That would depend on the shape of the bank. If it was practically vertical there would just be one at the bottom and one at the top. If it was vertical part of the way up, and then a slope, there would be three; one at the [895] bottom, and one at the break where the slope was, and one at the top.

Q. Now, at the time you made the measurements, on I believe you said February 5, 1945, the entire operation of pouring the concrete and removing the forms had been consummated, had they not?

(Testimony of C. E. Hewitt.)

A. There was some, I think, that the forms were in.

Q. Sir?

A. The forms were off of most all of them, but I think at the lower end, I think there was some the forms were not yet off.

Q. On 60 do you indicate those structures where the forms were not yet off?

A. No, I don't think so.

Q. So there is no way of telling from 60 whether you measured from a naked, completed structure, or from the concrete?

A. Measured from the concrete.

Q. Well, how would you, where the form was on?

A. You can tell where the concrete was.

Q. Sir?

A. You can tell where the inside of the form is.

Q. You would just estimate, and measure, and make an offset?

A. Measure from the inside of the form.

Q. Did you show the base, or just the floor of the excavation; [896] the base of the structure, or just the floor of the excavation?

A. Just the floor of the excavation.

Q. Without regard to the base of the structure, or did you measure the floor of the completed structure?

A. What do you call the base of the concrete?

Q. The base of the concrete, where the concrete sits on the dirt; did you measure at that point, or did you measure from the floor, five inches or more above?

(Testimony of C. E. Hewitt.)

A. I took it from the elevation given on the structure, of what was required.

Q. Did you check against the control point in the field, the government's control point in the field, for elevation?

A. As to the elevation that was given on the bottom of the structure?

Q. Yes, sir. Did you check against the control point in the field, the actual stake? A. No.

Q. You didn't do that on any of these structures, sir? A. No, sir.

Q. Did you make any measurements from any engineering stakes in the field, to prepare 60?

A. Engineering stake?

Q. Yes, sir, any engineering stakes?

A. No, sir. [897]

Q. Did you make any determination as to alignment, forward or backward, on the station?

A. No, I didn't.

Q. What laterals were you on?

A. What laterals?

Q. Yes, sir.

A. Well, the laterals that were shown on that.

Q. What numbers? A. I couldn't say.

Q. How much territory, cross country, did you cover as to laterals? Did you work on one lateral only, or several?

A. I took all the structures from where we started, down as far as we went, that were available, that I could get in to; if there was some that were back filled there, of course I couldn't tell; others that were not were taken.

(Testimony of C. E. Hewitt.)

Q. You didn't inform yourself as to laterals, what laterals you were on? A. No, I didn't.

The Court: We'll take a recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Hewitt, please, may I understand, are the blue lines [898] on 60 a copy you made off of the lay-out structures, but on a different scale? In other words, did you take the lay-out structures and compute the blue lines or extend the blue lines from the lay-out structures?

A. Yes, from the measurements.

Q. In other words, you took the lay-out structure and then you would reproduce the concrete wall, and that would be off of the lay-out structure; that's where you got the blue line?

A. Yes, this plat or cross section was made up in the office after the time that the measurements were taken on the field.

Q. Yes; now, then, the earth bank line was the result of measurements you made in the field, or estimates, which? A. Yes, measurements.

Q. Measurements, sir? A. Yes.

(Testimony of C. E. Hewitt.)

Q. Would you step here to 60 a minute? I'd like to ask you about one. Referring to the last drawing on the right side, in the upper corner, and to the more nearly perpendicular blue line, and its relative relationship to this irregular——

A. The irregular has nothing to do with it.

Q. In other words, the irregular has nothing to do with it?

A. Nothing to do with the measurements; simply separating [899] that.

Q. That is the graph that you have prepared inside of the regular line only, this side of it?

A. Yes.

Q. So that in every instance, on every one of these structures, the red line which you have extended, theoretically extended, not from measurement, but theoretically extended, is that the outside limits of the structure measurement?

A. That is the outside of the bank as it would have been had it been on a slope of one to one.

Q. And in each instance theoretical?

A. Yes, sir.

Q. And not upon any measurement of any kind in the field?

A. Well, there would be no occasion for any measurement in the field.

Q. Then your answer is that it is not based upon any measurement in the field? A. Yes, sir.

Q. Thank you, sir. Now, would you also while you're here, Mr. Hewitt, refer to picture 49-56, which counsel called to your attention, showing sta-

(Testimony of C. E. Hewitt.)

tion and structure 415-A. Have you reproduced that upon the graph?

A. I couldn't say for sure whether it is or not.

Q. With reference to 415-A, it shows on page 86, is that [900] 36, 66, or—— A. 86.

Q. Page 86, that would be, of the lay-out?

A. Yes.

Q. From your graph can you give the measurement at the base of the structure as shown in the photograph 49-56?

A. Well, there's several different walls there.

Q. Well, the wall that shows in the photograph; do you show it?

A. See, at the bottom there, there was four different walls in connection with that structure.

Q. Mr. Hewitt, this is a reproduction of you, isn't it, behind that structure in 49-56?

A. Yes.

Q. All right. Now, you see the point I am indicating where the earth is away from the structure, near the base of the structure, as shown in the photograph? A. Yes.

Q. All right; do you indicate that width on your graph?

A. Eight-tenths of a foot at the bottom.

Q. Eight-tenths at the bottom, you indicate the width as shown in the photograph. Can you tell me how much of the structure is below the photograph surface, and how much above?

A. No, I couldn't tell you. [901]

(Testimony of C. E. Hewitt.)

Q. So that photograph, 56, cannot, then, be fairly used with the graph to show a true condition, can it?

A. It does to me. It shows a true condition to me.

Q. The graph shows the true condition, does it not?

A. You couldn't get measurements from the picture, but it shows the condition.

Q. With reference to this picture 56, and calling your attention to the rule which you have out from the structure, do you not, to the earth surface——

A. Yes.

Q. Can you tell me from the graph the distance to the earth, at the surface of the soil, from the graph, can you tell me that?

A. I don't know what you mean by the distance to the earth.

Q. The distance to the earth from the structure, off of the graph? A. Yes.

Q. At the surface of the soil?

A. Yes; it is a foot and two-tenths.

Q. A foot and two-tenths; that would be about fourteen inches? A. Yes.

Q. A little over fourteen, would it not?

A. Yes.

Q. Yes, sir; and would you step here once more, please, Mr. Hewitt? I'm sorry. With reference to structures 427 and [902] 428, can you tell me, as shown by picture 67, Exhibit 49, sub-number 67, can you tell me whether or not that structure is reproduced on your graph?

A. That's 427 and 428?

(Testimony of C. E. Hewitt.)

Q. Yes. A. Is this the page, 67?

Mr. Olson: No, that's the picture number. That has nothing to do with the page.

A. It's been over two years since I've seen this thing.

Q. Yes, sir. A. Here's 468.

Q. No, 427, Mr. Hewitt. Is this 427 and 428 here, Mr. Hewitt, marked on page 65? A. 427.

Q. Are those the structures shown in this picture 67? A. Yes, I assume that they are.

Q. I don't want your assumption.

A. The number is what you have to go by.

Q. I see; you can't tell me?

A. I couldn't tell by looking at it. You have to go by the number.

Mr. Holman: I have no other questions, your Honor.

The Court: Mr. Hawkins?

Cross-Examination

By Mr. Hawkins:

Q. Mr. Hewitt, did you examine the specifications, 1062, [903] before you went out into the field? A. Yes, sir.

Q. Did you read the entire set of specifications?

A. I couldn't say definitely.

Q. Well, to be perfectly frank about it, counsel called your attention to the paragraph 47, didn't he, and said "Those are the specifications"; isn't that what happened? Someone called your attention to that particular paragraph?

(Testimony of C. E. Hewitt.)

A. I don't recall that they did.

Q. You don't recall. You found that by reading through the whole——

A. I have a copy of the specifications in my office. I still have. I had all the time I was working.

Q. Yes, surely. Now, you read through the entire set of specifications?

A. I don't know that I did.

Q. You don't know that you did. Can you tell me whether there is any place other than page 23 that shows or purports to show any specifications with respect to excavation?

A. I don't know what pages they're on. That was just my interpretation of the specifications as I had them.

Q. At that time? A. At that time.

Q. And you can't say now whether you read the entire volume [904] or not?

A. No, I couldn't say.

Q. And you can't say whether someone called your attention to page 23 and you let it go at that?

A. I don't recall that.

Q. You don't recall that? It might be true?

A. Yes.

Q. It might be?

A. I don't recall who it was gave me the specifications now, whether I got it from Mr. McKelvey and Kelley; they was over here; they are the ones I went down and went over the project with in the first place.

(Testimony of C. E. Hewitt.)

Q. You talked to them before you went out on the project, of course; you had to talk to somebody before you went out?

A. Well, it was the attorney's office in Seattle that called me up and made an appointment to go down there.

Q. And in the meantime you obtained a copy of the specifications?

A. No, I didn't obtain anything.

Q. And the first time you had a copy of the specifications is when you went out?

A. I think it was the time they decided they wanted me to get some measurements; I hadn't seen them before that, so far as I know.

Q. At any rate, you can't point out at this time any other [905] part of plaintiff's 3 other than page 23, that sets for the purported specifications with respect to the excavation?

A. No, none that I know of.

Q. None that you know of. Do you know whether there are any plans either in the specifications or in the structure lay-out, for an excavation?

A. No, I don't know that there is.

Q. The structure lay-out, plaintiff's 12, does not set forth any diagram of any excavation, does it?

A. No, it doesn't show the excavation; it shows the structure.

Q. Pardon?

A. It just shows the structures.

(Testimony of C. E. Hewitt.)

Q. It just shows the structures, and so far as you know, there is no place either in the specifications or structure lay-out any diagram or plan of an excavation? A. Not that I know of.

Q. Yes. Now, when you went out to inspect these excavations in all cases the concrete had been poured, is that right? A. Yes.

Q. And the measurements that you obtained at that time were based on the actual condition of the bank, the soil bank, at that time? A. Yes.

Q. Did you take into consideration or make any allowance for [906] any dirt that might have spilled down over the bank against the form?

A. You'll notice on the plan that there is some places where it specifies that the dirt has sloughed in.

Q. Has sloughed in?

A. Has caved off after the time, possibly.

Q. And in how many cases did that occur, sir?

A. I don't know how many.

Q. Quite a few cases? A. Oh, several.

Q. Several, yes. Now, in some instances the forms had been stripped from the concrete at the time you were out there, is that not right?

A. I didn't get that.

Q. In some instances the forms had been stripped from the concrete? A. Most cases.

Q. That was true in most cases? A. Yes.

Q. Did you in making your notes out there, and in making up this graph, Exhibit 60, take into account or make any allowance for any soil that may have fallen into the excavation by reason of withdrawing the forms from the excavation?

(Testimony of C. E. Hewitt.)

A. Only in those cases, I think, where it is specified that [907] the dirt has been sloughed in.

Q. I see.

A. The only result of that would be that the banks would fall further back than they were originally.

Q. Not at the foot, though? A. Huh?

Q. Not at the foot, though?

A. Well, at the foot, of course, what falls in just raises up the elevation.

Q. Not only raise up the elevation, but it would also shorten the distance between the concrete wall and the bank, is that not right? A. No.

Q. You mean it wouldn't slide in the bank, it would just fill in flat in all cases?

A. Yes, practically so.

Q. Now, as a matter of fact, in almost every instance, did not dirt drop down in the excavation between the concrete wall and the bank?

A. Probably, more or less.

Q. Well, to be perfectly honest, that would invariably happen, wouldn't it, whenever they went out there and removed forms? Is that not right?

Mr. Olson: Your Honor, he wouldn't know that happened. [908]

The Court: I'll overrule the objection; go ahead.

A. Well, yes.

Q. Where the dirt had spilled in and, as you say, raised the elevation, did you take that out to observe the distance between the foot and the bank?

A. I did not.

(Testimony of C. E. Hewitt.)

Q. Then your graph is based upon your surmise as to what that distance actually was?

A. It is a measurement on the bottom as it stood on the ground, between the concrete and the bank.

Q. And your graph does not purport to be a measurement of the actual condition at the time the structure was placed in the excavation, before the concrete was poured into that?

A. If there were any difference, I think it would be less; that would be the only difference, the distance back would be less.

Q. Except at the foot, isn't that right? After there had been a cave-in there would be less distance at the foot? A. No, there would be more.

Q. More distance at the foot?

A. Yes, sir.

Q. Mr. Hewitt, if there were a ten-ton concrete mixer about five feet from the edge of the bank, do you think the operation of that mixer at that close proximity to the [909] edge of the bank would cause any cave-in? A. It might.

Mr. Hawkins: That's all.

Further Cross-Examination

By Mr. Holman:

Q. The stability of that soil, Mr. Hewitt, what is its angle of repose in these places you took these structures?

A. That bank in most places will stand practically vertical.

(Testimony of C. E. Hewitt.)

Q. You say its angle of repose is less than one to one?

A. In cutting that bank, I say on a cut bank it stood almost vertical.

Q. Well, is the natural angle of repose less than one to one?

Mr. Olson: The question has been answered. If it stands vertical, the angle of repose would be less than one to one.

Q. The natural angle of repose?

A. If it was loose dirt, of course, it would be flatter than a vertical slope.

Q. Yes, sir; the normal angle of repose of earth in that area where you made these measurements is what?

A. If it was loose dirt I presume it would be something like one half to one, something like that.

Q. You'd say the angle of repose is one half to one, sir?

A. Well, that would depend very much on conditions.

Q. Talking about these structures you were actually in.

A. Some of them was sandy structures, and some was volcanic [910] ash.

Q. All right, sir; what was the angle of repose as determined by you in sandy soil?

A. I didn't determine the angle of repose.

Q. What is the angle of repose in sandy structures? A. I don't know.

Q. And what is the angle of repose of ash?

A. I don't know.

(Testimony of C. E. Hewitt.)

Q. And what is the angle of repose in any other earth contained out there?

A. Well, the angle of repose varies with the condition of the soil and what kind of soil it is.

Q. What is the angle of repose of the rock?

A. Loose rock?

The Court: Did you say yes? You're nodding your head.

Mr. Holman: I asked him rock.

The Court: Well, is it loose rock, or solid rock?

Q. Any rock you encountered out there.

A. The angle of solid rock is to whatever you excavate, probably.

Q. Was that shattered or solid rock out there?

A. If it was loose rock the angle of repose is somewhere about 45 degrees.

Q. 45 degrees in shattered rock or loose rock?

A. Yes.

Q. Was that loose rock out there? A. No.

Q. Was it solid rock you encountered?

A. Rocky soil.

Q. What did you say the angle of repose was in solid rock?

The Court: Whatever you cut it, he said.

Q. Yes; but does it have an angle of repose, a natural angle of repose, solid rock?

A. No, solid rock does not.

Q. Did you in reading specification 47, which counsel read to you, make any distinction as to slope adaptability for pipe line excavation as against structure excavation?

(Testimony of C. E. Hewitt.)

Mr. Olson: That's objected to as being immaterial, because I didn't go into any pipe line excavations at all.

The Court; Sustained, as not proper cross-examination.

Q. Did you review the various typical graphs contained in drawings one through, oh, to the end of the book, in the specifications? Did you consult those various typical drawings?

A. I don't think I get your question.

Q. I wanted to know if you consulted these typical drawings in the back of the specifications, in making up your Exhibit 60? [912]

Mr. Olson: Do you know what he's asking you, or do you want to see them?

The Court: He had better look at it, if he's going to answer it intelligently.

Mr. Olson: You're asking with reference to 1062, counsel?

Q. Yes. Did you consider those drawings in the back, Mr. Hewitt?

A. I don't know that there's any drawings in here that I considered.

Q. I asked you, sir, if you considered them.

A. I don't think I referred to any typical drawings.

Q. Would you say, in making up Exhibit 60 and in preparation of your field notes on the blueprints that you had from the Bureau office, you did not consider any of the typical sections in the back of the specifications? A. I think not.

Q. Sir? A. No, sir.

Mr. Holman: That's all.

The Court: Any redirect?

Mr. Olson: No, your Honor.

The Court: That's all, then, Mr. Hewitt.

(Whereupon, there being no further questions, the witness was excused.) [913]

JAMES A. BLACK

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. James A. Black.

Q. Where do you live?

A. Spokane, Washington.

Q. And by whom are you now employed?

A. H. H. Walker, Inc.

Q. By whom were you employed on specifications 1062 of the Roza Project.

A. Sam Macri Company.

Q. Did you work on both 1062 and 1068?

A. I did.

Q. And have been subpoenaed here by them?

A. Yes.

Q. In what capacity did you work on 1062?

A. As an engineer, doing fine grading?

Q. Doing fine grading? A. Yes.

Q. Were you or were you not superintendent at any time as far as 1062 was concerned?

A. No.

(Testimony of James A. Black.)

Q. With reference to 1068 what capacity if any, did you have? [914] A. The same capacity?

Q. Fine grading? A. Yes.

Q. You weren't the superintendent in charge of 1068? A. Not until the last of the job.

Q. Now, when did you come on the job on 1062?

A. As near as I can recall, about November 21, 1944.

Q. November 21, 1944? A. Yes.

Q. And who was the superintendent of 1062 at that time for Mr. Macri? A. Mr. Stickney.

Q. And later on who? A. Mr. King.

Q. Now, your specific job on 1062 was fine grading, you say? A. Yes.

Q. Now, Mr. Black, state whether or not—that question may start out to be leading—what was the situation, Mr. Black, with reference to having available sufficient men under you to do the fine grading ahead of Mr. Schaefer's carpenters?

A. There was times when I had plenty of help, and there was other times I was very short.

Q. Were you or were you not able to complete the fine grading ahead of the carpenter crew? [915]

A. At times I was ahead, and at times they were right close to me.

Q. Were there times when the carpenter crew was delayed because of the fine grading not being done? A. Yes, there was times.

Q. Do you recall having to return back on the job to do fine grading on holes that had been left?

A. Yes.

(Testimony of James A. Black.)

Q. And how far was it between excavations there, Mr. Black?

A. Oh, it would vary all the way from 60 to 1200 feet, probably; in rare cases it might be a little further, that is, on the laterals, and sometimes a half mile between laterals; however, in that instance, why, it would be about a half mile between structures.

Q. This was up to 1200 feet between excavations on one lateral? A. Yes.

Q. And then between laterals there would be how far, you say?

A. Oh, there would be up to a half mile; I don't believe it was over that, any time.

Q. Now, did Mr. Macri give you any instructions with reference to sub-grade?

A. Well, he told me at one time not to be too particular about it; to get the job done.

Q. Did he say anything about how close you were to come to [916] the sub-grade?

A. As I recall it, he said about two to three tenths.

Q. And how far off would that be in inches?

A. Well, that would be between two and a half and three or four inches.

Q. You mean two and half to four inches?

A. Approximately.

Q. Now, with reference to the outside banks, the bank of the excavations, were they at a 45 degree angle, or not? A. They were not.

(Testimony of James A. Black.)

Q. And what angle, if any, were they?

A. They were approximately vertical.

Q. Did you have the same crew of fine graders under you for any appreciable length of time on 1062?

A. Not a complete crew, no.

Q. Pardon?

A. Not as a complete crew, no.

Q. And what was the situation with reference to whether or not you had a continuous crew?

A. Well, some days Mr. King would need part of the men somewhere else, and I was left short. Other times I would have what I considered at that time about a full crew, five men.

Q. Now, you came on November 21?

A. Yes. [917]

Q. Did you continue on the fine grading, then, on 1062, from then on until you went to 1068?

A. I did.

Q. What was the situation of the ground at that time of the year?

A. Well, most of the time it was frozen.

Q. And did that facilitate your fine grading, or interfere with it?

A. Yes, it surely did.

Q. Well, it surely did what?

A. Slow it up to a great extent.

Q. Now, you say you didn't have the same crew to continue with you on 1062. How did that affect, if it did affect, in any way, your ability to continue with the fine grading in an orderly manner?

A. Well, I'd have to watch them more careful, and never could get them broke in completely as to

(Testimony of James A. Black.)

understand fine grading, and a lot of times when I'd have to be away, why, the work wasn't done as I laid it out, as it should have been.

Q. Now, with reference to job 1068, Mr. Black, did you have charge of and did you supervise the performance of the first fine grading on that job?

A. I did.

Q. And when was the first fine grading done on 1068? [918]

A. That started on the first day of February, 1945.

Q. Were there any structure excavations ready for the placing of concrete structures, or forms for concrete structures, prior to February 5, 1945?

Mr. Holman: Your Honor, I object to that as outside the issues in view of the exhibit already in the evidence showing that as of January 3, 1945, the job had been taken over from the Concrete Construction Company by Macri.

The Court: Well, I think it would have probative value only as it relates back.

Mr. Olson: Well, I can state what my position is. Counsel on November 30 directed us to go ahead and put in structures. On January 3 they held us in default. I'm showing that even up to February, 1945, following, there wasn't any excavations ready for forms to be put in. The purpose is to show by this witness that on November 30, when he told us to go to work, no holes were ready. On January 3, when they said we were in default, they still were not ready.

(Testimony of James A. Black.)

Mr. Holman: Until counsel shows he had structures ready to put in holes, it would be immaterial.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.) [919]

Witness: No.

Q. Now, you had an opportunity, Mr. Black, or did you, to observe the banks of the excavations made on 1068? A. Yes.

Q. And how were they made?

A. I tried to make them two foot out, from 18 inches to two foot out, on a vertical.

Q. And were they made vertical, or approximately so? A. Approximately.

Q. Now, with reference to 1068, when did they first start making forms, or do you know, for structures on 1068?

A. No, I couldn't tell you when they started making them in the yards.

Q. Were they making forms for structures on 1068 when you finished your first fine grading on February 5? A. Yes.

Q. Macri and Company was already making forms then? A. Yes.

Q. Now, do you know if Mr. Macri had sub-contracted the 1068 at that time?

A. No, I don't know.

Q. Was there anybody else beside you in charge of that work as far as the structure forms were concerned?

(Testimony of James A. Black.)

A. There was Mr. McCarthy and Mr. Burnsted there at that time. [920]

Q. And what did they have to do, if you know, with reference to 1068? What were they doing with reference to 1068?

A. Well, my understanding was——

Mr. Holman: Object to his understanding.

Q. What were they doing?

A. Mr. McCarthy was superintendent of the field work. Mr. Burnsted was doing the office work.

Q. Now, getting back for just a moment to 1062, how much hand labor would it take on those excavations, Mr. Black, in order to get them to the right sub-grade elevations?

A. Well, they varied considerably according to the structures. Some of the structures we could fine grade in possibly three hours, that's a crew of two men; there was other structures, a couple that I spent as much as 120 man hours; that was on the east turbine lateral and a few big structures.

Q. I take it you did not take 120 man hours on each one of these?

A. Oh, no, just that one particular structure.

Q. Now, where was Schaefer's crew on putting in their forms on 1062 as far as your excavations were concerned, your work was concerned?

A. Well, sometimes we'd be right close together, and there was other times I'd be off on a different lateral entirely, quite a ways away. [921]

Mr. Olson: You may examine.

(Testimony of James A. Black.)

Cross-Examination

By Mr. Holman:

Q. Mr. Black, was a statement secured from you by Mr. Schaefer before you took the stand?

A. Yes.

Mr. Holman: I call upon counsel to produce the statement.

Mr. Olson: I have the same objection, your Honor, not material, as shown by the last time that counsel called for it; it was refused from evidence. I say to your Honor I do have a photostatic copy, but I have not referred to it nor looked at it in any way in my direct examination. If your Honor suggests I give it to counsel I'll be happy to do so. I submit it is not material.

The Court: It doesn't seem to me, Mr. Holman, assuming you have a right to demand these statements, that your demand is timely at the conclusion of the testimony of the witness. There's a way for you to procure documents for inspection, and you haven't done that, and it doesn't seem to me we should take the time in this trial to have you demand and examine each one of these statements given some time prior to the trial.

Mr. Holman: Well, I'll cover it in another way.

The Court: All right.

Q. Mr. Black, you were subpoenaed by the United States [922] Marshal? A. I was.

Q. In Spokane, to come here as a witness for the defendants Macri? A. I was.

(Testimony of James A. Black.)

Q. And you were in your subpoena directed to bring all books, memoranda and records that you had, were you not? A. That's right.

Q. Did you have a copy of this statement?

A. Yes, I have a copy.

Q. Did you bring it? A. No, I didn't.

Q. And you have been here for a week, have you not? A. Yes.

Q. And there has been repeated requests that you secure that statement?

A. Well, you asked me to get a copy of it.

Q. Yes, sir, over Sunday, this last Sunday. Did you get it?

A. No, I didn't. I didn't go back to Spokane as I planned.

Mr. Olson: Your Honor, I don't want to take any chance on this thing. I'll submit it to counsel if he wants it. I haven't seen the original, counsel, but that is a photostatic copy. I also have no objection to it going into evidence.

Mr. Holman: I'm sorry, but you gave me John Klugg's statement. I don't want to read that one.

Mr. Olson: You can read it if you want it. Maybe I spoke too hastily. Do you mind if I read this first?

(Whereupon, Mr. Olson handed the statement of James A. Black to Mr. Holman.)

The Court: Am I correct in assuming that this witness was subpoenaed by Maceri first?

Mr. Holman: Yes, your Honor.

(Testimony of James A. Black.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. This statement was secured how long ago, Mr. Black?

A. I believe it was some time the latter part of October. I couldn't tell you the exact date.

Q. Now, did you notify Mr. Macri that a statement was secured from you? A. No.

Mr. Olson: It is objected to as being immaterial. I don't see the purport of whether these people called Mr. Macri every time somebody called them, or they did something.

The Court: I'll sustain the objection.

Mr. Holman: Your Honor, I would like at this time to move that the direct testimony of the witness Black be stricken, on the ground that he has not complied with the subpoena served upon him; he has not produced the documents indicated. [924]

Mr. Olson: Your Honor——

The Court: Just a moment. He was subpoenaed by Macri to produce certain documents?

Mr. Holman: Yes, sir.

The Court: Does that prevent his being called, since he's here, by opposing counsel, without having the documents? I'm just trying to get your position here. It doesn't seem to me his testimony should be stricken, if it is material, just because he was subpoenaed by one side and is called by the other, and does not produce the documents under

(Testimony of James A. Black.)

the subpoena that was served upon him. Do you have anything to say in support of your motion?

Mr. Holman: Only, your Honor, that instead of the witness producing what we sought from him in preparation of our case, and the use of this witness, now called out of turn as plaintiff's witness, we are deprived of the information except at the graciousness of counsel.

The Court: Well, the Court doesn't know what subpoena you served upon him. It isn't in the record, is it? There isn't any showing that he hasn't complied with the subpoena.

Mr. Holman: It should be in the record; the Marshal served it.

The Court: What was it you demanded of him that he did not bring? [925]

Mr. Holman: All the records pertaining to this job; all documents. I haven't the exact wording, that's in the subpoena there.

The Court: Well, this seems to be sort of a blanket subpoena, asking him to bring everything that he has, every document, in connection with this job.

Mr. Holman: That's all we could do, your Honor.

The Court: Yes, of course, but what do you claim that he had, now, that he did not produce?

Mr. Holman: My claim is that having subpoenaed this witness through the Marshal's office in the regular course, at his regular place of residence, without the ability in advance to consult the matters

(Testimony of James A. Black.)

subpoenaed with this witness we are just deprived of a factual cross-examination where plaintiff brings him on the stand upon the same things, your Honor, this job.

Mr. Olson: I submit, your Honor, I have put counsel in a much more favorable position than he has any right to expect when I call his witness on direct and give counsel a right to cross-examination on matters on which I have interrogated. Certainly counsel can't say he was prejudiced at all.

The Court: I'll deny the motion.

Q. (By Mr. Holman): Mr. Stickney employed you, did he not, Mr. Black? [926]

A. Yes, he did.

Q. Now, you worked under Mr. Stickney. Did you work under Mr. Ashley? A. No.

Q. Who else did you say, under whom else?

A. Mr. King.

Q. Mr. King; and while you have been here you have roomed in the same hotel with Mr. Stickney?

A. Yes.

Q. And have been closely associated with him, have you not? A. Yes.

Q. Did you have any financial transactions between you and Mr. Stickney while you were here?

A. Just private.

Q. Private only, nothing to do with the compensation for this case, one way or the other?

A. No.

Q. You were in charge of the fine grading on 1062? A. The last part of it, yes.

(Testimony of James A. Black.)

Q. Well, from the time you went on?

A. Yes.

Q. Yes, so the fine grading from the time you went on to the end of your work on 1062 was a matter of your own volition, depending only upon man power, is that correct?

A. That's right. [927]

Q. Yes, and the employment of man power was a matter between you and first Mr. Stickney and later Mr. King as superintendents, right?

A. Well, it was up to Mr. King or Mr. Stickney to hire the help.

Q. And did you make requests for help that they refused you at any time?

A. I made requests for help; I wouldn't say they refused me. I don't know as they could get the men or not at that time.

Q. Wasn't it a fact also that at that time there was a very considerable shortage of labor available?

A. Yes, there was.

Mr. Olson: That's objected to as being immaterial, and I move the answer be stricken.

Mr. Holman: This is a question of good intent, your Honor, on the matter of Macri progressing with his work.

The Court: Well, I'll overrule it.

Q. You were not at any time denied the right to put on any fine graders if they were available, were you, Mr. Black?

Mr. Olson: That's objected to as not being material, whether he was denied the right to put on fine graders. The question is, were they there.

(Testimony of James A. Black.)

The Court: I'll sustain the objection. [928]

Q. Well, you said there were times when you had plenty of help, and times you didn't. Now, was that due to the labor market, or was that due to their being discharged, or what was the fact?

A. No, they weren't discharged. Mr. King had to take them to different parts of the job; he was trying to back fill and one thing and another, and he'd take them to different parts of the job, from me.

Q. But with your permission; they weren't just taken away from you?

A. Well, he'd tell me he had to have them.

Q. And you acquiesced? A. Yes.

Q. Now, isn't it a fact when you first came onto the job, under Mr. Stickney, you superintended the hand excavation of one of the structures on lateral 59.3, I believe? I'm mentioning hand excavation, Mr. Black, as distinguished from shovel excavation; did you make a hand excavation there?

A. Well, I made several hand excavations, but I don't recall the lateral number.

Q. In other words, at times when the shovel or the hoe, it's been called both here, would be off at a distance cross country, or up a lateral, would there be hand excavation made by you? [929]

A. Yes.

Q. In lieu of the power excavation?

A. Yes, in preference to bringing back the hoe.

Q. When I say by you, that is made under your direction, under your supervision? A. Yes.

(Testimony of James A. Black.)

Q. And were the excavators common labor?

A. Common labor.

Q. And the supervision of appropriate fine grading was your responsibility? A. Yes.

Q. Yes, sir. Did you have any conversation with Mr. Schaefer with respect to the fine grading?

A. I did not.

Q. Or with his representative, Mr. Darcy?

Mr. Olson: That's objected to, your Honor. I didn't go into the question of conversations.

Mr. Holman: I think counsel is right. I'll withdraw that question.

The Court: Yes, it is not proper cross-examination.

Mr. Holman: That's correct, sir.

Q. (By Mr. Holman): Did you determine any specific time that the carpenter crew was delayed because the fine grading had not been done?

A. No, only in one instance. [930]

Q. One instance is all that you know, Mr. Black?

A. That is, that I kept any time on.

Q. And what was that instance?

A. It happened to be a rock structure up on the hill, that the hoe didn't get to.

Q. Rock structure? A. Yes.

Q. Can you indicate the structure? Do you know the structure? A. I could pick it off the map.

Q. Off the work lay-out? A. Yes.

Q. Would you do that, please?

A. No, I meant the map.

(Testimony of James A. Black.)

Q. Referring to plaintiff's 22, can you call me that structure, please, Mr. Black?

A. It would be, I believe that is 285, on lateral 68.3.

Q. Structure 285 on lateral what, please?

A. That lateral number can't be right, I don't believe, on the map, or that structure number.

Q. Structure 285?

A. 285 D and E, is what is marked here.

Q. D and E?

A. D and E; there were five structures.

Q. And how much time was the carpenter crew delayed on that occasion? [931]

A. Well, they moved up there when I went up to fine grade it, and I was there two days and a half.

Q. Were they delayed two days and a half?

A. They were there practically all that time.

Q. They were delayed two days and a half?

A. Yes.

Q. And how many men were in the carpenter crew, do you know? A. Carpenters?

Q. How many men in the carpenter crew?

A. Two.

Q. Two men; and when was that, about?

A. That, sir, I don't know. I gave Mr. King those notes that I kept on that.

Q. That's what I was going to ask you next. You reported to Mr. King and gave him that detail?

A. Yes.

(Testimony of James A. Black.)

Q. And before doing that, did you submit it to Mr. Darcy or anyone else so that they knew of that?

A. No, I didn't.

Q. Now, that was a case where the crew was held up because you couldn't do your fine grading in time?

A. Yes, that's right.

Q. Was there any other occasion that you can identify?

A. No, not as to the structure.

Q. Was any memorandum of any kind given to you by Mr. Darcy [932] or anyone for the Concrete Construction Company with respect to this delay that you've called my attention to?

A. No, not to me.

Q. Now, with respect to this fine grading being two to three tenths high, is that what you said, high, or off? High, wasn't it?

A. Yes.

Q. It wasn't ever performed by you below grade, was it?

A. Only in the instance where the hoe had over-dug.

Q. Only where the hole had been over-dug?

A. Where the hole had been over-dug by the hoe.

Q. Then you would go and tamp in the earth up to the grade where it should be?

A. Yes.

Q. You did that, did you not?

A. Yes, sir.

Q. And in these places where it was from two to three tenths above grade, that was for the purpose of preventing the shovel teeth from excavating down to disturb the actual grade, wasn't it?

A. Well, in some cases, and cases where the ground was frozen, yes, it was very hard to get it right on the nose.

(Testimony of James A. Black.)

Q. Yes, sir; in other words, at that particular time it was hard to get it to grade?

A. That's right. [933]

Q. And the reason for leaving it was to avoid disturbing the grade, so you wouldn't have to go back and tamp it, wasn't it?

A. Well, where I staked out structures for the hoe to dig I always made it a point to leave it at least five tenths high for hand digging.

Q. Yes, sir; that was contemplated for hand digging by the fine grading crew under your direction?

A. Yes.

Q. And that was a normal co-ordination between shovel excavation and hand grading?

A. Yes.

Q. Hand shoveling? A. Yes.

Q. And that was the discussion you had with Mr. Macri, that same purpose, was it not?

A. I don't recall, now. I had two or three discussions with Mr. Macri on fine grading.

Q. Well, I refer to your direct examination; in substance, according to my note here, Mr. Macri had told you not to be too particular, to get the job done, and do it to two or three tenths, and I believe you told counsel that would be two and a half to four inches high? A. That's right.

Q. That was the purpose of the talk between you and Mr. [934] Macri, also to expedite the job?

A. Well, I don't recall that that was the purpose at the time.

Q. But it was recognized you would go back and fine grade to grade, was it not? A. Pardon?

(Testimony of James A. Black.)

Q. It was recognized you would go back and fine grade to grade?

A. I always made that attempt, yes.

Q. And you conscientiously made that attempt throughout, did you not? A. I did.

Q. Sir? A. I did.

Q. Can you give me the approximate time it would require for two men to fine grade a structure that had not been fine graded at all, an average structure, let's say a four foot deep structure?

A. A four foot deep structure?

Q. Yes, sir.

A. It would take them, on the average structure lay-out plan, about a day and a half, two men.

Q. A day and a half, one and a half days, to fine grade what type of structure, now?

A. The average structure in the lay-out plan. Not a pipe [935] line structure, but delivery.

Q. No, the average lay-out structure; one man?

A. Two men.

Q. Two men; and those men would be under the fine grader's direction, or somebody's direction, so it would be unskilled labor, would it not?

A. Yes.

Q. Was there at any time while you were on the job that any statement was furnished you by any of the Concrete Construction Company men of any claimed time lost because of your fine grading operations?

A. No, there was never a statement given to me.

Mr. Holman: That's all.

(Testimony of James A. Black.)

Cross-Examination

By Mr. Hawkins:

Q. You are an engineer, are you not, Mr. Black?

A. Well, in a fashion, yes.

Q. How long have you been engaged in this kind of work?

A. You mean this particular type of work?

Q. Yes.

A. I believe on fine grading I started in March, 1944.

Q. For Sam Macri?

A. No, for H. H. Walker, Inc.

Q. H. H. Walker, Inc., and then later you were employed by Macri, is that right?

A. Yes. [936]

Q. And at the present time you are employed by Walker? A. Yes.

Q. And do you do that same type of work now, or not?

A. No; I have charge of sagging the wire.

Q. Charge of what?

A. Getting the wire up to the right kind of tension.

Q. I see. Mr. Black, in these excavations, in performing these excavations, you of course followed the plans and specifications, did you not?

A. I did.

Q. You had those plans and specifications in your possession? A. Yes.

(Testimony of James A. Black.)

Q. Did at any time Mr. Schaefer or any of his employees, these employees of the Concrete Construction Company, ever complain to you that your walls were vertical when they should have been a slope?

A. Yes, they complained about them being vertical.

Q. And what did you say with respect to that?

A. Really, I don't believe I said anything.

Q. Now, then, you did your fine grading on these concrete inlets, outlets, and syphon vents and drains, did you not, on the job?

A. On 1062?

Q. On 1062.

A. These turbine turn-outs I did. [937]

Q. With reference to drawing 33-d 2598, which is part of—what exhibit is this, counsel?

Mr. Holman: That's my copy you're using there, isn't it?

Mr. Hawkins: Yes.

The Clerk: Is that 1062?

Mr. Hawkins: Yes.

The Clerk: Plaintiff's 3.

Q. (By Mr. Hawkins): Now, calling your attention to that particular drawing I just mentioned, Section EE, what slope does that call for, sir?

A. One to one slope or steeper.

Q. One to one or steeper?

Mr. Olson: I'm going to object to this as not being proper cross-examination.

(Testimony of James A. Black.)

Mr. Hawkins: Well, I'll withdraw this line of examination, with the understanding this witness will remain. I assumed like the others you wanted him excused.

Mr. Olson: I have no objection to their using Mr. Black for whatever they wish, your Honor. As a matter of fact, I would like to see him accommodated, but I want them to make him their witness.

The Court: It doesn't seem to me it is proper cross-examination. It goes beyond the scope.

Mr. Hawkins: Well, I understood counsel went into [938] the vertical bank. I may be mistaken. If he did, I'd be entitled to interrogate him as to the slope which he thinks the specifications call for.

Mr. Olson: He did testify, your Honor, that the banks were vertical.

Mr. Hawkins: I think I'm entitled to go into that subject. This relates to it, why he did it.

The Court: Well, all right, go ahead. I'll overrule the objection.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. What bank or slope does that call for?

A. That calls for one to one or steeper. This particular check here is a neat sub-grade.

The Court: What were you referring to, Mr. Hawkins?

Mr. Hawkins: I was referring to drawing 33, attached to the exhibit in question. It was 33-D 2598, that is drawing number 33.

(Testimony of James A. Black.)

The Court: Yes; well, there are about, on my page here, drawing 33 shows at least a dozen different drawings.

Mr. Hawkins: Yes; it is section EE, your Honor.

The Court: All right.

Mr. Hawkins: And that was the section I particularly called his attention to, but you'll notice the [939] same thing with reference to section AA or CC, one to one or steeper.

Mr. Olson: Is that a structure excavation, counsel?

Mr. Hawkins: That is a structure excavation.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, Mr. Black, did your men ever get in the way of Mr. Darcy's crew?

A. Oh, I imagine that at times you might call it in the way, when we had to go back and do a little extra work on the structure. When I fine graded the structures I didn't dig any cut-off walls, and we had to go back and do those.

Q. Why didn't you do those before?

A. Because of the fact that in putting up forms you would walk around the narrow trench and break off the sides of it.

Q. In other words, when you put in one of those structures it is desirable to get in there with a shovel just as the form is being set down; otherwise dirt will get underneath it? A. Yes.

(Testimony of James A. Black.)

Q. And if you'd dug these cut-off walls prior to that time you would have had to go back to them anyway? A. Yes.

Mr. Hawkins: That's all.

Mr. Ivy: No questions. [940]

Mr. Holman: On this last question, Mr. Black, what was the practice with respect to covering any shallow structures that might be made? Did you put any boards or anything over them to protect them when you fine graded? A. No.

The Court: Any redirect?

Mr. Olson: Yes.

Redirect Examination

By Mr. Olson:

Q. Mr. Black, counsel interrogated you if you could remember any specific instance of delaying the carpenters, and you related one instance, I believe, on which you held them up two and a half days, and then asked if you remembered the identity of any other structures as to where the delay was, and you said no. I'll now ask you, were there, even though you can't remember the identity or the specific number of the structures or location of them, were there other occasions where the carpenters were delayed by reason of the fine grading not being finished?

Mr. Holman: I submit that's calling for a conclusion of the witness, when he says he can't remember any of the structures.

(Testimony of James A. Black.)

The Court: He said he couldn't identify them by number, as I recall. [941]

Mr. Holman: And counsel is asking a general question.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I object to that as improper redirect, your Honor.

The Court: Overruled.

Witness: Yes, there was.

Q. And how frequently would that occur, Mr. Black?

A. Oh, that's pretty hard to say.

Mr. Hawkins: I didn't hear what you said.

The Court: Hard to say, is that what you said?

A. Yes, that would be pretty hard to say. There would be times when I'd be asked to go back a couple of times a day, and then I might go for a week without being asked to go back and work on a structure. That's too long ago, I can't remember just off-hand now.

Q. You remember the delay existing, but as to the frequency of it, per week, you're unable to give us that information, is that right?

A. No, I can't, now.

Q. Now, you said it would take one and a half days on the average to fine grade the average layout plan structure, assuming you had two men working on that structure? [942]

A. Yes.

(Testimony of James A. Black.)

Q. Is that while the ground was frozen, or unfrozen?

A. No, that would be while the ground was unfrozen.

Q. And would it take a longer or shorter time while the ground was frozen?

A. Oh, it would take longer.

Q. And there were times, you say, when you had a crew of one man to fine grade for you?

A. From one on up.

Q. And sometimes five; and you may have answered this; what was the full crew of fine graders that you should have had?

A. Ordinarily——

Mr. Holman: Well, just a minute. I object to counsel's question, the full crew he should have had. There's an inference there is a compulsion of a certain sized crew. I'll submit it is not proper redirect.

The Court: Yes, I'll sustain the objection.

Q. In order to complete the fine grading and keep ahead of Mr. Schaefer's carpenters on this project, what size crew would it take, Mr. Black, to complete your fine grading?

Mr. Holman: I object to that as based upon speculation, your Honor. It requires a great many elements in order for the witness to answer as a hypothetical [943] question. It has to be hypothetical, until the various steps are——

The Court: Well, I'll sustain the objection. There are a good many unknown quantities there.

(Testimony of James A. Black.)

Mr. Olson: That's all. Excuse me——

The Court: Are you through?

Mr. Olson: Yes, your Honor. I didn't have available to me this drawing 23 because my specifications were in evidence, and I've been looking for this notice on here where it said, according to counsel, "one to one or steeper." I would like to—I assume that counsel is attempting to show that the specifications call for a different slope. Would you show me that?

Mr. Hawkins: That was drawing 33.

Mr. Olson: Well, I have what I think is drawing 33 here, but I don't find it.

Mr. Hawkins: This was on the contract I'm speaking of. You're on the specifications.

The Court: You used a document not in evidence, then, Mr. Hawkins?

Mr. Hawkins: No, it was Exhibit 3.

The Court: Well, that's Exhibit 3.

Mr. Olson: I understood it was EE of drawing 33. I'm unable to find that.

Mr. Hawkins: Apparently there is some difference [944] between the two that I examined. If so, I apologize to the Court.

The Court: I know it was inadvertent, of course. I think the record should show that the witness in giving that testimony was not referring to or did not have before him plaintiff's identification 3.

Mr. Hawkins: Perhaps overnight I can find the explanation for that.

(Testimony of James A. Black.)

Mr. Olson: In the meantime, I move that the testimony be stricken from the record on the ground it is not the best evidence, and that the specifications speak for themselves.

The Court: I think it should be stricken, and that counsel should have an opportunity—just a minute.

Mr. Olson: If you're referring to that, that's not a structure excavation at all.

Mr. Hawkins: Well, that's not what I was referring to, but it shows excavation one to one.

Mr. Olson: There was excavations that was vertical; I admit that there are, on Exhibit 25 or 23, some excavations vertical on the neat lines, but if there is any reference to drawings that refer to an outside bank one to one or steeper, I'd like to see it.

Mr. Hawkins: Your Honor, drawing number 26 attached to specifications 1062, being plaintiff's [945] Exhibit 3, shows under section AA, that is a portion of the drawings appearing on there, a cut of one to one or steeper.

The Court: What drawing number is that?

Mr. Hawkins: 26. Now, that is not the drawing that I referred the witness to, however.

The Court: Well, I think we should strike what he testified to before, and then you'll have an opportunity to call his attention to one of these drawings that's in plaintiff's Exhibit 3 in the morning, if you care to. Counsel and the witnesses in this case will be excused. I have another matter to take up before adjournment. We'll reconvene in this case tomorrow morning at 10 o'clock.

(Testimony of James A. Black.)

Mr. Holman: Your Honor, we were talking among ourselves and wondering whether it might be, instead of taking half days, the other case would intercede for its conclusion, and then we could come back, instead of having to spend half days. There is a lot of expense here. I would at least like your Honor to consider that.

The Court: Well, I'll consider that; however, I understand from Mr. Olson, or I take it from Mr. Olson's expression here, that he doesn't wish to agree to that.

Mr. Olson: No, your Honor.

The Court: What I'm trying to do is to expedite [946] both cases as much as possible, and make a fair arrangement or adjustment. The other people have witnesses from a very long distance here, and I just want to give them an opportunity to get rid of some of them, but I'll consider that.

Mr. Holman: It would be very much appreciated.

Mr. Olson: Speaking on Mr. Black's behalf, he would like to know whether he's free to go home or not.

The Court: Well, we haven't concluded with him. I was in hopes that could be done.

Mr. Olson: Was that a matter you wanted to go into with Mr. Black? Do you want Mr. Black?

Mr. Holman: He's subpoenaed as a defense witness. Naturally I want him.

The Court: He's subpoenaed as a defense witness, and will remain here anyway.

(Whereupon, the Court took a recess in this cause until Tuesday, March 4, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, March 4, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Hawkins: May I address the Court, please?

The Court: Yes. [947]

Mr. Hawkins: With reference to this confusion that existed yesterday with respect to drawing number 33, I find that in interrogating the witness I referred to drawing 33 attached to specifications 1068. The identical drawing, however, appears as drawing number 24 on specifications 1062. It is identical in every respect. It is dated the same date, Denver, Colorado, August 25, 1942, and bears the same serial number that I read into the record at that time, 33-D-2598.

The Court: Well, I have been looking at this drawing, and it is difficult for me to make out what it is, because I'm not an engineer, but it seems to me that it refers to a syphon filling concrete structure, and that the slope referred to, one to one or steeper, does not refer to any graded side wall that the witness referred to on direct.

Mr. Hawkins: The witness testified that slope represented a neat concrete line. I think you will find that is a weir wall, that is, it cuts against the channel of the water, and the one to one referred

to is the line to which the concrete must go in order to stop the flow of the water. Now, then, the structure, if it is an excavation of slope of one to one, then the weir wall must extend out to a slope of one to one in order to stop the flow. If in fact the structure is less than one to one, [948] or is perpendicular, then the slope of that weir wall must conform to that structure. In other words, it illustrates my point that the drawing shows that the specifications do not specifically call for a one to one slope in the excavation; it may be steeper.

The Court: This witness wasn't called as an expert. He's simply testifying, as I understand it, as a workman here. He did say he was an engineer.

Mr. Hawkins: I asked him if he was an engineer. He said yes.

The Court: He wasn't called or didn't testify on direct as an expert; he simply testified what his observation was, that the excavations were vertical. It seems to me that in order for this testimony to be of any value in the record, it would first have to be shown that he knows what these drawings are, and that he could interpret them as an expert. He said he was an engineer. I don't know what that means. There are all sorts of engineers.

Mr. Hawkins: He did testify, however, that he had the specifications on the job and followed them on the work there, and having used them, I think he's entitled to testify from that experience.

Mr. Olson: Do you contend, counsel, that that drawing you refer to was used by anybody on this project, [949] or was referred to?

Mr. Hawkins: I don't think that question is properly directed to me.

Mr. Olson: There's been no testimony introduced on it, your Honor.

Mr. Hawkins: All I know about this case is what I've seen here in Court, and I have made some attempt to analyze these specifications, and I'm trying to give the Court whatever benefit can be derived from that analysis that I've made. The witness has testified that was a one to one or steeper slope, that it was a neat concrete line. He did not say it was an excavation slope at all; he was very careful to do that.

The Court: His testimony would be valules to me and I think any appellate court unless he knows what this drawing is, what it represents, and what its relationship may be to the work he did.

Mr. Hawkins: I can interrogate him further.

Mr. Olson: Counsel is making him his own witness, I presume, because I didn't interrogate with reference to those specifications. I interrogated as to the slope of the walls as actually excavated. If this is his witness, I understand this witness has some twenty men being held up, if they can accommodate him by putting his testimony in, I have no objection. [950]

Mr. Holman: In that connection, this witness called me last night by 'phone, said he was out of money, had not been paid, and that he was having the utmost difficulty paying his hotel bill. I told Mr. Black while he was on the stand I could not discuss this with him, I planned on going over his

work last night, and that he was not off the stand, and I was compelled not to talk to him about it. I would suggest before you make any such statement as that you might take care of his hotel bill.

The Court: Well, I assume if he's subpoenaed by one party and used by another, there would be some adjustment made in paying his expenses here.

Mr. Holman: We have subpoenaed Mr. Black and paid the regular mileage from Cheney here and one day's witness fees and one day's subsistence, in the amount of \$26.00, is that correct?

Mr. Black: That's right.

Mr. Holman: I don't like to be charged with plaintiff's delinquency, and in addition get a hurry-up call for payment of money.

The Court: When did you subpoena him to appear, Mr. Holman?

Mr. Holman: On the 25th, I believe. It is in the file here. [951]

The Court: On the first day of the trial?

Mr. Holman: No, the second day.

The Court: Has he been held here since that time on the request of the plaintiff?

Mr. Holman: I understood so, your Honor.

The Court: I'm just trying to—I think some adjustment should be worked out.

Mr. Holman: He's been reported as a plaintiff's witness.

The Court: If the plaintiff gets through with him and you wish to keep him, then I think the burden should shift to you.

Mr. Holman: That's correct.

Mr. Olson: Do you contend that you released Mr. Black at any time since he was subpoenaed?

Mr. Holman: I just decline to be interrogated by counsel unless I am on the stand.

Mr. Olson: I did, your Honor, last Friday, hand Mr. Black a subpoena to be here yesterday morning, but outside of that I had nothing to do with Mr. Black being here last week.

The Court: I don't know that there is any question before the Court now as to the payment of this witness' expenses, but I think the party who subpoenaed him would be responsible until they got through, until [952] the other party subpoenaed him, and then they would be responsible until they got through. That's my idea on it. I'll permit you to interrogate him on this. The objection will be over-ruled. Do you have the right book now?

Mr. Hawkins: I have 1062, yes.

The Court: I don't believe you have. Isn't that 1068?

Mr. Hawkins: This is a copy of it.

The Court: Oh, yes. I just wanted to be sure you had the right copy.

Mr. Hawkins: I thought possibly your Honor might want to follow.

JAMES A. BLACK

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Recross-Examination

By Mr. Hawkins:

Q. Referring to drawing number 24 of specification 1062, do you know what those drawings represent, Mr. Black?

A. Well, they're pipe inlets or outlets. That's a structure where a pipe takes water across the road or into a ditch and delivers it into another structure. They also at times have weirs on them, and on other times they don't, and also part of the structure shows the structure delivery into the ditch, or delivery to a farm.

Q. Now, can you tell the Court what a weir wall is? [953]

A. A weir wall is just a plain wall set in a ditch, at the end of a ditch, usually, for delivery of water to a farm, a weir wall of various sizes to measure water to a certain tract of ground.

Q. Yes, and the weir wall shown in, for instance, section EE is perpendicular to the flow of water, is it, that is, it cuts across? A. Yes.

Q. And that slope marked one to one or steeper would show the slope of the ground on which the concrete rests, is that right?

A. That's right.

Q. And must the weir wall extend out to the ground? A. What?

(Testimony of James A. Black.)

Q. I say, must the weir wall extend out to the ground on either side? A. Yes.

Q. Why?

A. Well, to keep the water from washing in underneath it, or washing out the weir wall.

Q. If your excavation for the structure is vertical rather than a one to one slope, what would you have to say about the slope of the weir wall at the ends?

A. Well, it would have to be compacted to your one to one or steeper slope. However, these weir walls were never [954] put in out on any of the work I was ever on. They were always vertical end, rather than a one to one slope.

Q. It was a vertical end? A. Yes.

Q. And the wall just ran to the vertical line?

A. That's right.

Q. And where the drawing says one to one or steeper, I take it that was the situation contemplated? A. Yes.

Mr. Hawkins: I think that's all.

Recross-Examination

By Mr. Holman:

Q. Mr. Black, the concrete was poured to the vertical slope you just answered counsel about, and the work accepted that way?

A. That's right.

Q. Yesterday you answered counsel Hawkins, according to my note, that there were other occasions—I believe counsel Olson—there were other

(Testimony of James A. Black.)

occasions where carpenters were held up, there would be times when you were asked to go back a couple of times a day, and there might be a week before going back. Do you remember that testimony, sometimes you were ahead and couldn't go back? . . . A. Yes.

Q. Now, the thing I'd like to know with respect to that, Mr. Black, if in any instance there was a statement furnished [955] to you of claimed loss of time by your not getting back there earlier to fine grade? . . . A. No.

Q. Nothing ever given to you to forward to Maceri, in writing? . . . A. No, sir.

Mr. Holman: That's all, your Honor.

Redirect Examination

By Mr. Olson:

Q. Mr. Black, referring to the drawing number 24 of specifications 1062, were any such excavations or any of that type of drawing used any place on project 1062?

A. Not on any of the work I was connected with.

Q. Now, does the drawing as indicated there, as shown, a one to one or steeper—what part of the concrete slab does that refer to?

A. That refers to the head wall.

Q. Pardon? . . . A. Head wall.

Q. Yes, but what portion of it would rest on that line there marked one to one or steeper?

A. Well, that would be, this weir wall is in most instances eight inches wide, and just the bottom and this one to one slope would rest on the ground.

(Testimony of James A. Black.)

Q. It is the bottom of it, then?

A. That's right.

Q. Is there any form that goes against that?

A. Just against the sides.

Q. Would it be possible for you, Mr. Black, by adverting to these model excavations, to illustrate that drawing in any way?

A. Well, this is an entirely different type from what you have over there. This is just a plain wall; there's no box or anything attached to it.

Q. Just a plain wall? A. Yes.

Q. And that cut represents the underneath or the bottom part of the wall? A. That's right.

Q. Instead of coming over and squaring up, that could come over and slant up? A. Yes.

The Court: Am I correct in assuming that that concrete would be poured against the excavation, without any outside form?

A. No, there would be an outside form on the ends and sides.

The Court: Where it says "one to one or steeper," that's a cross section there?

A. Yes.

The Court: Where it says "one to one or steeper" under that line, would there be a form under there? A. No. [957]

The Court: Or it rests against the dirt?

A. Just dirt.

Q. Do you know what these typical drawings are, attached to these specifications, Mr. Black?

A. Yes.

(Testimony of James A. Black.)

Q. And what are they?

A. Well, they show the various typical designs of different types of structures used by the Bureau of Reclamation service, and they are not, the structures themselves are not taken from that book; they're taken from the structure book.

Q. Lay-out plan?

A. Those are typical drawings.

Q. Necessarily relating to this project, or what are they?

Mr. Holman: Just a minute. Your Honor, I submit the witness is not qualified to answer that.

The Court: Well, I think I'll sustain the objection. It's leading, at any rate.

Mr. Olson: That's all.

Mr. Holman: May I amplify this just a little with the witness, your Honor?

The Court: All right.

Mr. Holman: I have another copy of 1062; may I use it?

The Court: All right. [958]

Recross-Examination

By Mr. Holman:

Q. Referring to drawing 24 in specifications 1062, for section AA at the bottom left hand column, now, the top of that, which is marked "plane" is looking down on that structure, isn't it?

A. That's right.

(Testimony of James A. Black.)

Q. And the longitudinal section next below that is what, is that a cross-section?

A. No, that's not absolutely a cross-section.

Q. How do you look to get the cross-section?

A. Well, you'd be looking from the side.

Q. Then the pipe inlet structure with check, section AA, is still a reference to the plan on the top, isn't it?

A. Yes, that's a reference to the top.

Q. Then the section AA would be what part of the plan on the top? A. This part right here.

Q. Yes; now, when you say "this part" that is the long wall on that drawing? A. Yes.

Q. I didn't know whether that was clarified, your Honor; and that would hold so for each of these other structures?

A. Yes, these are just a little different type structures, inlets and so forth.

Mr. Olson: And what part—were you through, Mr. [959] Holman?

Mr. Holman: Well, I think I am. I just wanted to get that clear.

Mr. Olson: And what part of that long wall, the top side or the bottom side?

A. The way we're looking at that, it's the top side.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: I'd like to ask one additional question.

(Testimony of James A. Black.)

Recross-Examination

By Mr. Holman:

Q. Was there at any time any place on your work where there was a definite specification such as this, that you didn't comply with it? In other words, if the government has specified a certain slope you followed it, did you not? A. Yes.

The Court: Any further questions?

Mr. Olson: Well, in view of that last question, your Honor—well, I'll ask that the answer to the question be stricken, your Honor, as not proper cross-examination, and calling for the conclusion of the witness. I think he can testify what he did. That last question's going to open up a whole phase of the examination again. In other words, he's testified that the [960] walls or the banks were excavated vertical; now counsel is saying if they call for a one to one slope he excavated that way.

The Court: I understood the question to mean where there was a specific slope designated on a drawing of some kind, whether he followed that. That's the question, wasn't it?

Mr. Holman: That's the question.

The Court: I'll deny the motion.

Redirect Examination

By Mr. Olson:

Q. Do you recall of any excavations, then, Mr. Black, where the drawings or specifications specifically called for any slope as shown on this drawing that's been shown to you? A. Not on 1062.

Mr. Olson: That's all.

(Testimony of James A. Black.)

Recross-Examination

By Mr. Holman:

Q. That is, not on 1062 with respect to structures? A. Yes.

The Court: Are you through with this witness now? Any further questions?

Mr. Holman: No.

The Court: Are you through with the witness?

Mr. Olson: Yes.

The Court: Then if he is to stay, he's your [961] witness.

Mr. Holman: Correct, your Honor, and at the very earliest opportunity I will excuse him.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: We would be glad to pay Mr. Black's expenses for yesterday. I hesitate very much to do it with one of Mr. Holman's witnesses.

The Court: I thought perhaps you gentlemen could get together on division of expenses. If you can't, upon proper application the Court will decide it.

Mr. Olson: I don't think there's any controversy.

The Court: All right, call the next witness, then.

ROBERT MONRAD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Robert Monrad.

Q. Where do you live? A. Yakima.

Q. Washington? A. Yes.

Q. Have you been in attendance since the beginning of this trial, at my request?

A. Yes, I have. [962]

Q. Now, were you employed on the job 1062 at the Roza project? A. Yes, I was, sir.

Q. And when did you first go to work on that job?

A. Well, I don't remember dates, but I started in with Macri and I think I worked for him two weeks, and then when they took over, Schaefer took over the job, I switched over to him.

Q. You were on the job when Schaefer took over, then? A. Yes.

Q. And did you stay—how long did you stay on the job 1062?

A. I stayed on the job 'till they finished pouring the concrete in '45, 1945.

Q. You were on it 'till they finished pouring concrete? A. Yes.

Q. Did you work any on 1068?

A. I worked two days for Macri on 1068.

(Testimony of Robert Monrad.)

Q. Well, were you discharged then?

A. No, I wasn't discharged. I got lost in the field both them days, and they chased around there, I couldn't find them, they would pour one structure and then they would head off into the country and I couldn't find them, they never told me or anything, so I went to Yakima and stayed there.

Q. Well, now, on 1062, then, Mr. Monrad, what was your duties or job on 1062? [963]

A. Well, I first started as a form bender.

Q. As a what?

A. A form bender, or a carpenter, whatever you want to call it, and I went out in the field once and started to set some forms in the excavations, and I believe I helped set about eight structures. The first one we started on was a little intake for to syphon the water under the road, that's a small structure, and the first thing I had to do, John Klugg was with me, he was my boss——

Mr. Holman: Who, please?

A. John Klugg.

The Court: Does this refer to the time he was working for Mr. Macri?

A. No. The first thing we had to do was to grab a pick and shovel and we shoveled dirt there for two hours to get the structure down to where it belonged. We went from there to the next structure, which had three structures in it, in that station, and we started to set our forms in there, and we put in the head panel and one outlet, and when we come to the other outlet on the other side of

(Testimony of Robert Monrad.)

the structure, why, there was a hole dug there under that outlet four and a half foot deep, and it should have been about six inches deep, so we couldn't do any more there, and we had to quit; and we went across the road into the next hole. I dug about nine and a half inches to dig out before it [964] would conform with the engineers' points, so that's all the forms we could do that day, and I just helped one other day out in the field, as they wanted me.

Q. What was your experience on that day?

A. Well, that structure was setting on top of the ground, with, oh, about eight or ten inches of dirt on one side, and the rest we had to fill in, and there was an offset about the middle, between two structures, a drop of about three inches. Now, that wasn't done with any drop. We had to make that three inch drop between the two structures.

Q. That was a three inch difference in elevation?

A. Yes.

Q. And you say the carpenters had to do that?

A. Yes, we done that, the boys I worked with and myself.

Mr. Holman: I object to counsel's last question as leading and not supported by the witness' statement. He didn't say the carpenters had to do it; he said "we had to do it."

The Court: Well, it was leading, but I'll let it stand now.

Q. Now, did you do any of the panel making?

A. What?

(Testimony of Robert Monrad.)

Q. Did you make up any panels at the beginning of the job, Mr. Monrad? [965]

A. Yes, I done quite a few of them. I think I was in the yard 'till we had 72 structures made.

Q. And can you describe the lumber as to quality and adaptability to this job?

A. Well, the first lumber we had there looked pretty good, but it must have come right out of the mill pond, because when I drove nails into the board, I get wet; all of it was wet, like it was raining.

Mr. Holman: May I have that answer?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: I move that portion with respect to coming out of the mill pond, your Honor, be stricken as a conclusion of the witness.

The Court: Well, that is stricken. The part that it was wet and when he hit it it sprayed on him will stand.

Q. Can you describe the lumber in any other particular, or does that describe it?

A. Some other lumber?

Q. I say, how was the lumber otherwise, other than being wet?

A. Well, that particular pile was pretty fair lumber.

Q. All right, and did you have opportunity to observe any other supply of lumber brought on the job later on?

(Testimony of Robert Monrad.)

A. Yes, they brought in lumber two or three times after that [966] when I was in the yard, and that was poor lumber, all of it.

Q. And what was the matter with it, Mr. Monrad?

A. Well, it's full of knots, and it was warped, and the two by fours was crooked.

Q. Now, you're speaking, are you, of lumber that was delivered to the yard while you worked in the yard? A. Yes.

Q. And you were in the yard, as I understand it, from what you said, building 72—panels for 72 structures, did I get that right? A. Yes.

Q. Then after that, Mr. Monrad, what did you do on the job?

A. I done the finishing, cement finishing.

Q. Cement finishing? A. Yes.

Q. When did you start doing that work with reference to when they started to pour structures? Did you start at the beginning of the concrete pouring, or not? A. Yes, I did.

Q. And what does the cement finishing consist of? What was your operation?

A. Well, the forms is set to a certain grade, and the cement finisher, when they finish pouring, it is high or low, or whatever it is, and he takes a wooden float and smooths [967] it down to the edge of the form, to get it even, and then takes a steel trowel and smooths it over.

Q. Did you have anything to do with the hole that was left in the concrete by this she-bolt?

(Testimony of Robert Monrad.)

A. Yes, when we stripped the form off I had to plug all them she-bolt holes, and also what we call "sack" the concrete on the outside down to where the dirt comes, or rather, a foot or foot and a half, something like that, on the structures, and on the inside boxes. I sacked all of it.

Q. You say "sack?" A. Yes.

Q. What is that?

A. You take a thin grout and put it on the structure with a brush, and then take a sack and rub it so to fill up all the holes in the structure, lots of little air pockets that have to be filled, and we rub that in.

Q. That is part of your finishing operation?

A. Yes.

Q. All right; now, in order to fill the hole left by the she-bolt in the concrete, just explain to the Court what you'd do to fill up that hole; in other words, what part of the structure you had to work on to do it.

A. Well, I had to be on both sides of the structure. When we stripped the form off I had to be on the outside and [968] drive some of that dry mud in from the outside, and then get on the inside and fill it from the other side, so it would be tight, but there was lots of places the dirt was so close to the structure I couldn't get in there without digging, or else I'd be standing on my head, kind of, to get it in there, that is, hanging over to get it in there.

(Testimony of Robert Monrad.)

Q. Now, did you have an opportunity to and did you observe, after you were on the cement finishing job, any of the carpenters doing any of the structure placing in the structures, in the excavations?

A. Yes, I seen lots of it.

Q. Did you observe whether or not they did any digging before they started putting in their panels?

A. Yes, I've seen them digging.

Q. Would you be able to tell us how long, or would you know about that?

A. Well, no, I couldn't say that.

Q. How frequent an occurrence was it that the carpenters did digging?

A. Well, any time I saw them start on the structures they were digging; before they could get started they had to dig.

Q. Every time you saw them start they had to dig?

A. Yes.

Q. Now, if you were on the concrete finishing, as I understand [969] it, which would be ordinarily behind the carpenters——

A. Yes.

Q. ——how would you see the carpenters up ahead of you?

A. Well, we was close to them; we was pretty close to them, so I could see them working.

Q. And would you tell the Court whether or not the concrete pouring operation was a continuous operation from day to day, or whether you were held up or interrupted?

A. No, we'd run maybe two or three days and then there was a lay-off; we'd lay off from three to five days.

(Testimony of Robert Monrad.)

Q. And why would that be, Mr. Monrad?

A. Well, that was because they didn't have any excavations ready so the carpenters could keep away from us.

Q. Mr. Monrad, did you help do any form removing or any stripping? A. Yes.

Q. And how come you were doing that?

A. Well, we'd come to a structure, and I couldn't do any finishing, that is, on that sacking, until we had the forms off, or plug up the holes. We had to have the forms off first, so I helped the boys to strip the forms and then I started my work finishing.

Q. Well, now, go ahead and tell about the form removing and stripping operations; how easy it was, or what difficulties [970] you had, or just what you run into.

A. Well, most of the places was too tight, so we couldn't get the forms out, without either digging or getting some prys and raising the form out that way, and that would break the form.

Q. And how often would that occur that the forms would be damaged in any amount?

A. Well, pretty near all of them was too narrow in one place or another. You would have lots of room on one side and the other side would be right against the strong-backs.

Q. Well, now, were the forms then, after being removed, in suitable condition to be re-used in the next structure without being repaired?

A. You had to repair them. They had to send them back in the yard and have them fixed up.

(Testimony of Robert Monrad.)

Q. Describe, Mr. Monrad, the excavations with reference to the slope, if any, to the bank.

A. They were vertical. There was no slope to it.

Q. And describe the clearance, if any, from your concrete itself, the panels, to the bank, that is, what was the distance between it.

A. From the concrete to the bank?

Q. Yes, and also from your panel, outside panel, to the bank.

A. Well, there was no room from the strong-back to the bank; [971] they were right up against each other, and then when they got the form out of there, that would leave about seven and a quarter inches from the concrete out to the bank.

Q. Did you work on each one of these concrete structures, Mr. Monrad? A. Yes, I did.

Q. And is that testimony that you've just given, is that typical of each of the structures?

A. That's what it is.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Monrad, had you been on other work in the Roza project before you started working for the Macri Company?

A. Yes, I worked from the Roza, then down the line.

Q. Yes, sir. Now, had you had experience on other projects with respect to making structures?

A. Outside of the Roza?

(Testimony of Robert Monrad.)

Q. Yes, in the Roza.

A. I had experience in the Roza in the same kind of work as we done there.

Q. Yes, sir, and in the Roza, on all of your experience, the banks were cut generally perpendicular, were they not?

Mr. Olson: That's objected to, your Honor, as being immaterial. It's what the specifications called for in this case. [972]

Mr. Holman: This man was a worker with respect to the excavations.

The Court: Well, I suppose this question will come up some time here, that it will be contended that it is proper to show what was customary.

Mr. Holman: What was acceptable to the government, your Honor; our position is that the test is under the specification, I can't recall the number right now, that we have read, 47, that the requirement is excavation to the satisfaction of the engineering officer in charge. That's the sole purpose, and we urge that your Honor, in view of the fact that the sub-contract in evidence provides that all the work of the sub-contractor shall be done to the satisfaction of the principal contractor, and that it shall be done to the satisfaction of the contractor.

The Court: Is it your contention that the requirement of excavation is definitely fixed by this sub-contract and main contract, Mr. Olson?

Mr. Olson: Yes, your Honor, as between the sub-contractor and the main contractor Macri. He handed us the specifications to submit a bid. We

(Testimony of Robert Monrad.)

read them over, as we would have to do, and they provide what Mr. Macri was to be paid for on his excavation. We had a right to assume that he was going to do that which he was to be [973] paid for, unless the sub-contract specified something different.

The Court: Well, I think that might be well contended as to the amount of excavation that was done so far as yardage was concerned, but the thing that bothers me here, and I would welcome any expression from either side about it, apparently there is no definite direction or specification, at least none that has been called to my attention, that requires these side walls where the concrete isn't to be poured right against the dirt, there isn't any requirement that the slope be to a one to one slope, except the provision in here that's been directed to the Court's attention that payment shall be made on the basis of one foot out from the base, and a slope of one to one. Doesn't that simply indicate the maximum that the Bureau will pay for in the way of yardage, and as a method of measuring yardage, and doesn't mean that each bank has to be cut necessarily on that slope? I don't know whether I make myself clear or not. For instance, if Macri made an excavation around the concrete, where it is necessary to make the side-walls, and took out a yardage equivalent to one to one, wouldn't that be compliance, even though the walls might be vertical? Now that's the thought that occurred to me from reading the specifications.

(Testimony of Robert Monrad.)

Mr. Olson: Well, your Honor, our position on this is that the Bureau of Reclamation in fixing up these specifications and saying what they would pay for, obviously were going to pay for only so much excavation as was necessary to be made in order to install the forms, remove them, and put in the structures. They're going to pay for that, and not pay for more excavation than was necessary, therefore that the Bureau of Reclamation in fixing that form of payment, that the necessary implication is in there that that is what's reasonably required for clearance, and to prevent sloughing, to enable the contractor to install these forms. Now, the fact that on some other project, the same contractor is doing the excavating and is also doing the concrete structure placing, he may figure that he can save a little money on his excavation, even though it is going to cost him some more money to put in his forms, and if he wants to do that, the Bureau of Reclamation don't care.

The Court: Did you have something to say, Mr. Hawkins?

Mr. Hawkins: Yes, I just had this thought in mind. The Bureau, of course, has laid down these specifications after a good many years of experience, and undoubtedly in the past contractors have excavated, four, five, six feet away from the structure, and have gone to the Bureau [975] contending it was necessary to excavate that far, and demanded for it. I take it just for the very purpose of avoiding that situation they put this paragraph

(Testimony of Robert Monrad.)

47 in, namely, that regardless, whatever excavation was necessary, the contractor was not going to get paid for more than the slope indicated. That doesn't mean it has to be at that slope, or that it would be greater or less. That relates solely to the mode of payment. The soil condition out in this area apparently varies from spot to spot. I've been over some of it myself, not in connection with this case, in other years, and I have always thought it was a rather sandy soil, and that any excavation made would necessarily tend to fill in, that it would just naturally have a 45 degree slope, but apparently the testimony is that is soil is such that a perpendicular wall can be maintained. Now, if that is the fact, of course that is all that is necessary to put in the structure. These exhibits might indicate you have an excavation fifty feet deep, but the average is only four or five feet deep. That's a proposition where you can almost reach to the bottom lying on the top. Some of the structures are large, of course, but they're relatively few. I think the proper test, as counsel has suggested, that an excavation required, is one that is suitable for the structure, and the testimony of this [976] witness as to what other contractors found suitable under similar conditions would be pertinent.

Mr. Holman: Your Honor, I would respectfully direct your Honor's attention to the sub-contract which is in evidence, and the very first part of it, after designating the project as Roza Division, Yakima Project, Washington, there is then this wording:

(Testimony of Robert Monrad.)

(Whereupon, counsel read Article I, a portion of Article II, Article III, of plaintiff's Exhibit 5, and paragraph 47 on page 22 of plaintiff's Exhibit 3.)

Mr. Holman: With that, I am asking this witness, who was on this job both for Macri and for Mr. Schaefer, as to excavations in that area, coupled with the fact, your Honor, that Mr. Schaefer has already answered that he made an inspection in the field before the contract was signed, and had investigated the specifications.

The Court: Well, assuming all that is required here is a reasonable excavation on Mr. Macri's part, it seems to me that this would be allowing too wide a latitude, to let a witness testify as to what was done on some other section of this Roza Project. In order for it to have any probative value as what was reasonable and customary, it seems to me you would have to show a similarity of conditions, and there wouldn't be a similarity of conditions if there were no sub-contract, [977] or if the sub-contract didn't have the same terms as this, so I'll sustain the objection to the question that was asked of this witness.

Mr. Holman: Your Honor, it is our position that if Mr. Schaefer wanted a one to one slope he could have provided specifically for a one to one slope in his sub-contract, then Mr. Macri could or could not have accepted it, but he has made no such provision,

(Testimony of Robert Monrad.)

and therefore general usage in a workmanlike manner, that's what it says, would be pertinent; that's what I had in mind.

The Court: Well, I don't think your general usage would be shown unless you could show a similarity of conditions. If Mr. Macri was doing his own work it doesn't make any difference how he does it, if he had no sub-contract on the other work, or if the conditions were different. I don't think I should go that far afield at this stage of the case. I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Monrad, you told counsel of having encountered an excavation that was dug four and a half feet deep when it should have been only, I think you said, six inches deep? A. Yes. [978]

Q. Now, did you go out there solely to inspect that for Mr. Schaefer, at that time? A. No.

Q. Did you report that to either Mr. Darcy or whoever your superintendent was?

A. No, I did not.

Q. You did not, sir; and did you get orders from your superior to fill that? A. No.

Q. Or change that? A. No.

Q. And I believe you said you filled it yourself, did you not? A. No, I didn't say that.

Q. Oh, I misunderstood you, sir; then you didn't do any work on that? A. No.

(Testimony of Robert Monrad.)

Q. And you don't know whether any work was done on that by the Schaefer crew, do you?

A. No. I went by there a few days later and it was fixed and cribbed up, but I don't know who done it.

Q. Yes, sir, that's right. Now, then, what did you say about this structure at the top of the ground? Would you tell me that one again? What about that one? You said there was some structure at the top of the ground? [979]

A. Yes.

Q. What about it?

A. I said we had to make a fill, where the outlet was, and there's a set-off from one structure to another of three inches, and that was not done; it was flat clear across the two structures here.

Q. Now, did you do that work?

A. Yes, I dug that down.

Q. Did you do that under instructions from someone?

A. I done that from Fred—I don't remember his last name.

Q. Waltie? A. Yes, that's right.

Q. And did you give Mr. Waltie a statement of your time expended on that, sir?

A. No, but he was there all the time.

Q. Never mind the "but"; did you do it, sir?

A. No, I didn't.

Q. And you didn't make any determination of charge, yourself, at all? A. Oh, no.

Q. Did you keep a time book of your own?

A. No.

(Testimony of Robert Monrad.)

Q. Now, you started out for Mr. Macri to build panels at the job yard, correct?

A. That's right. [980]

Q. How many do you think you built for Mr. Macri? A. That I couldn't say.

Q. Well, I notice here that you told counsel that you worked there until you had 72 structures completed. That would be the necessary panels for 72 structures, would it not? A. Yes.

Q. Would those structures be identified to certain excavations, or not, or were they general?

A. Yes, they were built to certain substations or excavations.

Q. In other words, sir, you built those structures with respect to drawings of structures on the lay-out? A. Yes.

Q. In other words, you had a copy of the lay-out?

A. Well, my boss had. He gave me the dimensions.

Q. All right. Now, you've got two bosses; you had Macri first? A. Yes.

Q. You were working, in fact, under Mr. Staples, weren't you? A. Yes.

Q. He was your first boss? A. Yes.

Q. Then your next boss was who, Waltie?

A. No, my next boss was John Klugg.

Q. Yes; all right; then you changed from Staples to Klugg, [981] is that it? A. Yes, sir.

Q. Now, then, what I'm trying to find out is, did you start building structures off of these lay-

(Testimony of Robert Monrad.)

out drawings under the direction of Mr. Staples at the time? A. No.

Q. Oh, who gave you the instructions?

A. John Klugg.

Q. Oh, Klugg was working for Macri, too?

A. Yes.

Q. Now, can you tell me whether or not the first forms you built were for the first structures on lateral 59.3, going forward on the stations?

A. On the first lateral is where we started.

Q. Yes? A. Yes.

Q. Starting with structures numbered 1, 2, 3—— A. Yes.

Q. In other words, as long as you were working for Macri you built structures beginning with 1 and going on through? A. Yes.

Q. Now, when you changed over from Macri employment to Schaefer employment, did you change the place of building structures, or did you go right on up? [982]

A. We went right on up the line.

Q. You built the panels for structures from numbers 1 to 72, inclusive, is that right?

A. That's right.

Q. On lateral 59.3?

A. I don't know the number of the place.

Q. Don't you know lateral 59.3?

A. I know the lateral, but I don't know the number of it.

Q. Well, the first lateral that the excavation was in, right? A. Yes.

(Testimony of Robert Monrad.)

Q. Now, did you stay on forms until they began pouring concrete? A. Yes, sir.

Q. And you worked steadily building forms, Mr. Monrad; you just worked steadily building forms right along, did you?

A. Yes, in the yard; I didn't lose no time between the two.

Q. All right; they began pouring concrete on July 31, 1944, did they not? A. Yes.

Q. All right, so that you worked in building the panels for 72 forms? A. Yes.

Q. From the start of the job in March, 1944, until July 31, 1944, correct? [983] A. Yes.

Q. Did you receipt for lumber that came onto that job, into that job yard?

A. Which is it?

Q. Did you receipt for lumber, or did Mr. Klugg do that? A. No.

Q. In other words, you were just a carpenter?

A. I just done the work, what they told me, that's all.

Q. Your rating was a carpenter, was it not?

A. Yes.

Q. Not a carpenter foreman? A. No.

Q. All right, sir. You were not in the form constructing crew at all? You did not at any time work as part of the form constructing crew, did you?

A. Well, if I make the forms, that would be it, wouldn't it?

(Testimony of Robert Monrad.)

Q. No, that isn't what I mean. You make the panels, don't you?

A. Anything that belonged to the form, I make.

Q. In other words, you make the parts that go into the form? A. Yes.

Q. But you were not out in the field as part of the crew putting those panels together?

A. No.

Q. Now, you then would not have any way of knowing whether [984] the panels which you constructed were put together in a workmanlike manner unless you checked them after they were in the ground, would you?

A. No, not until after they were set.

Q. Then with respect to grouting, you spoke of grouting, grouting is a cement term, is it not, for the filling to put in there where there is any hole or interstice, and it is generally of a quality that will stick in there, and then you finish it off with a more nearly liquid type of cement on there, and then you put your sack on there and rub it, so it doesn't appear at all; that's what you mean?

A. Yes.

Q. And the she-bolt would have a couple of cones to pull out, and there would be a little cylinder in there that you would fill full of this concrete material, and then fill out to the hole and rub it clean, right? A. That's right.

Q. And you say you sometimes would have to hang over the structure to fix it? A. Yes.

Q. You did hang over the structure to fix it?

A. Yes.

(Testimony of Robert Monrad.)

Q. And you fixed it, did you?

A. Yes, I fixed it. [985]

Q. Did you make any statement of extra time required for that? A. No.

Q. And did you make any report of that to your superior?

A. Yes, I talked to him about it.

Q. Did he make any notation of that at the time, sir? A. That I couldn't say.

Q. Not in your presence, he did? A. No.

Q. All right, sir. You told counsel about the carpenters digging on the setting of forms ahead. There's been some testimony here, Mr. Monrad, that the forms were from 60 feet up to a quarter to a half mile apart; is that right, the structures?

A. I suppose sometimes they were.

Q. So if you saw them digging they would have to be within reasonable range, would they not, of your eyes? A. Yes.

Q. Is your eyesight good, sir?

A. Yes, I think so.

Q. You can see a quarter mile or a half mile?

A. Oh, I didn't try to look at them that far.

Q. Then the only work you saw was in the structures near together? A. Yes. [986]

Q. And on lateral 59.3 the structures weren't a half mile apart? A. I couldn't say.

Q. They were all within your sight, weren't they? A. I think so.

Q. And they were within sight where you could see the work progress right along?

(Testimony of Robert Monrad.)

A. That I couldn't say. You know, the ground rolls there. They might be down in a hole someplace.

Q. All right, sir. Now, I believe you told counsel that on the concrete work, that is, your finishing work—when the concrete was being poured into a structure were you there then? A. Yes.

Q. What was your function while the concrete was being poured?

A. Oh, I helped them tamp it and shovel it.

Q. Then your own work began after the concrete had been cured and the forms had been taken off, sir? A. No.

Q. I'm talking now about your concrete finishing work? A. Yes.

Q. And then you would do this grouting and finishing that I talked with you about, right?

A. Well, I started finishing after they filled the form with [987] green concrete, then my finishing began.

Q. Yes, sir, but you had nothing to do with checking the forms as to position and grade and so forth; that was not your function, was it?

A. No.

Q. And insofar as you aided in stripping forms, that was while you were standing by to finish, wasn't it? A. Yes.

Q. In other words, that was kind of an incidental employment, wasn't it, right?

A. Yes, I suppose so.

Q. Mr. Monrad, is it or is it not a fact that in field practice, now, with respect to panels for forms,

(Testimony of Robert Monrad.)

they are adaptable to be re-used, and are expected to be re-used, and are expected to be continuously used until they are past the place where they are no longer fit for forms, is that right or not?

A. Yes.

Q. So when you told counsel the forms had to go back to the job yard to be re-cut and re-shaped, that is normal function of a form builder, is it not?

A. No.

Q. Sir?

A. No, it is not. If the form isn't spoiled in any way you bring it ahead to the next hole that's got the same [988] dimensions.

Q. Oh, yes, but if there isn't another structure of the same dimensions within reasonable vicinity, you don't use that form again, do you, sir?

A. No.

Q. Now, if you take it ahead to an identical structure in size and shape so it would fit, you yet have to take the concrete off of it, don't you?

A. Well, there's no concrete on it.

Q. Don't you have to take the concrete off the veneer?

A. No, it wouldn't stick there, it was oiled.

Q. I understand it is oiled, but if there is any concrete deposited there, don't you have to remove it?

A. If it was.

Q. And if there is any break or defect you have to fix that?

A. Yes.

(Testimony of Robert Monrad.)

Q. If there is any wrecking of the panel you have to fix that up, and if there is any cracks or anything to be done you have to fix that?

A. Yes.

Q. Now, you don't go out on the job to do that, do you? The form is brought back to the job yard?

A. Yes.

Q. And that is a regular procedure, is it not?

A. That is with the broken forms, yes. [989]

Q. Yes, sir; now, is it or is it not a fact the lumber was wasted because under the sub-contract it provided that Mr. Macri should be the ultimate owner of it; did you throw lumber away?

Mr. Olson: Now, counsel's asked about three questions. If he's asking about the last question, if he threw lumber, I think that is proper, but if he asked if it isn't a fact that lumber was wasted because Macri was furnishing it, that's objected to.

Mr. Holman: I'll withdraw that.

The Court: Better ask the question again.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Isn't it a fact, Mr. Monrad, that you were given a great deal of latitude by Schaefer to discard lumber any time you wanted to?

A. It was not.

Q. What was your instruction from Schaefer with respect to lumber, and I mean by Schaefer, John Klugg or Mr. Darcy or whoever was on there?

A. Use every bit of it that we could.

(Testimony of Robert Monrad.)

Q. And re-use it until it was finally exhausted?

A. Yes, sir.

Q. Now, was that done, sir? A. It was.

Q. Can you tell me how much lumber was used on that job? You [990] were there all the time.

A. No, sir, I couldn't. I didn't have nothing to do with that.

Q. Can you give me an estimate of it, from your experience? A. No, sir.

Q. You can't tell me the quantity at all?

A. No.

Q. And did you ever inquire? A. No.

Q. From Mr. Darcy or anyone?

A. No, sir.

Q. Did you ever make out a list of lumber required? A. No, sir.

Q. Did Mr. Klugg ever make it out in your presence, sir? A. No.

Q. And so far as you know there was no list furnished by you or by Mr. Klugg for any lumber?

A. No, I don't know that any was.

Mr. Holman: That's all, sir.

Mr. Hawkins: I have no questions, your Honor.

The Court: Any redirect?

Mr. Olson: Yes, I have a couple of questions here.

(Testimony of Robert Monrad.)

Redirect Examination

By Mr. Olson:

Q. Mr. Monrad, when I examined you as to setting forms out in the field, I understood you to tell me that you had [991] set a few of the panels and forms, the first part of the project, and again later on then I understood you to tell counsel that you had not worked in the field. Now, did you or did you not?

A. Well, I worked in the field when I set them, I think it was eight structures.

Q. Well, that's what I thought, you did assemble eight structures in the field?

A. Yes, with others.

Q. Now, counsel further asked you if you had worked steady in the yard assembling forms from March through July 31, and I understood you to say that you had.

A. Yes.

Q. Was there any period in there that you were off the job for any reason?

A. No, we was in the yard, we was repairing; the lumber was so bad that we built the forms and then it dried up and then I spent two weeks in the yard taking the new forms apart and pulling them together, tightening them up.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: I have not, your Honor.

(Whereupon, there being no further questions, the witness was excused.) [992]

ALLYN R. HUNTER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Your name is Allyn Hunter?

A. Allyn R. Hunter.

Q. Where do you live, Mr. Hunter?

A. In Portland, Oregon.

Q. What is your business, Mr. Hunter?

A. I'm in the insurance and bond business.

Q. And with what company?

A. I happen to own Rogers Insurance Agency.

Mr. Holman: Would you give me that?

(Whereupon, the reporter read the last previous answer.)

Q. You say you own it. Now, Mr. Hunter, had you had any bond connection with job 1062?

A. Yes, we wrote a bond for the Concrete Construction Company on 1062, Roza Project.

Q. On its sub-contract? A. Sub-contract.

Q. Now, Mr. Hunter, have you ever engaged in any other business [993] besides the bond business?

A. I spent about 17 years in the engineering and construction business before going into the insurance business.

Q. 17 years? A. Yes, sir.

Q. And are you a graduate engineer?

Q. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. Were you out on project 1062 during the course of its construction? A. I was.

Q. And do you remember about the first time that you were on the project?

A. Along about the middle of June, 1944.

Q. Who did you go to the project with?

A. I drove from Portland to the project in my automobile. Mr. Schaefer and his superintendent, Fred——

Q. Waltie?

A. ——Waltie were with me.

Q. Now, did you meet anybody at the project?

A. We met Mr. Macri and his engineer or superintendent or whatever he was, Mr. Cohen, at the job office.

Q. What did you see when you got to the job office?

A. Forms, steel tied forms setting around. The shovel was there, broke down or being overhauled.

Q. Now, on the shovel, what do you mean? [994]

A. It was a hoe.

Q. You mean the big shovel for excavation, mechanical shovel?

A. Yes, sir; and we met Mr. Macri and Mr. Cohen there and had some discussion.

Q. Now, can you tell about how many panels were going on?

A. Very problematical; I would say in rough figures anywhere from 30 to 50; I might be away off on that, but there were considerable panels around there.

(Testimony of Allyn R. Hunter.)

Q. Now, Mr. Hunter, will you just go ahead and tell what took place, what was said, in Mr. Macri's presence?

A. Mr. Macri, Mr. Cohen, Mr. Schaefer, Fred Waltie, and myself went out on the project to look over some of the project, and Mr. Schaefer and Mr. Macri started in arguing right off the bat as to the structure excavation, so we drove out in the car; I couldn't give you the exact location. However, Mr. Waltie had a layout plan with him which I suggested he bring along. We went out and looked at maybe four or five structures that were in, and on both occasions Mr. Macri and Mr. Schaefer were arguing considerable about how tight they were, and there wasn't room, in my opinion, to put in forms properly.

Mr. Holman: I move that be stricken as not responsive, this last, your Honor. He's giving his opinion, and the rest, he's telling what happened.

The Court: Well, do you question his qualifications [995] as a construction engineer?

Mr. Holman: We might find that out later, your Honor; I don't know.

The Court: Well, I'll let it stand for the present. It's a question of opinion of an expert.

Witness (continuing): We walked on up and looked over several of the holes which had been dug, evidently by a hoe, and I would say that we looked at four or five holes over a matter of a half mile walking, or something like that. They were roughly excavated, and I got down in the hole with Mr.

(Testimony of Allyn R. Hunter.)

Waltie and measured up the approximate yardage in the hole, the distance out, and the length of it.

Q. And what you find?

A. And these holes were not long enough, they were not wide enough, for structures. As to their elevations in the bottom, there had been no work done, just the hoe teeth showed in there, and the soil was of such a nature that it could be excavated much wider to get your forms in properly.

Q. Were there on that day, or did you on that day check any excavations that the fine grading had been done in, or were there any?

A. Not as to the elevation in the bottom of the holes, no. I had no level or anything there to check the exact fine [996] grading in the bottom of the holes, which would require an instrument.

Q. Did you check and of the excavations for alignment?

A. Just from the hubs, yes.

Q. What did you find in the regard?

A. Well, I would say that it was a typical excavation of a hoe, without any hand work being done on the structure excavation.

Q. Now, did any conversation ensue there, Mr. Hunter, in Mr. Macri's presence?

A. Mr. Macri requested Mr. Schaefer to take over the fine grading, and Mr. Schaefer said "I will not have anything to do with the fine grading," and argument pursued; finally Mr. Schaefer told him that as soon as he got the fine grading on the button, that he would start out and put in his struc-

(Testimony of Allyn R. Hunter.)

tures, his forms, and pour his structures, and keep going, but he had to have enough of this ahead to keep him going, and Mr. Schaefer was very, very definite as to the structure excavation at that time being on the button.

Q. I'd just like to interrupt here; was there any work going on on the project at the time?

A. Not to my knowledge, there was nothing going on.

Q. Then proceed with the conversation.

A. So Mr. Macri said "Well, if you will get your men down in [997] the holes and take care of this additional work, I will pay you for it" and Mr. Schaefer said "I'll not do any of that work; that is not my job" and at that time Mr. Macri spoke up and said "If you will do any of this additional work here that necessitates any extra expense or cost to you I'll pay for it."

Mr. Hawkins: Your Honor, again I object to that testimony.

Mr. Holman: I join, your Honor, and move it be stricken.

The Court: The objection is on the same ground?

Mr. Hawkins: On the same ground, that it varies a written contract which expressly provides that no subsequent oral agreements can vary it.

The Court: Overruled.

Mr. Holman: May I have the witness's last statement?

(Whereupon, the reporter read the last previous answer.)

(Testimony of Allyn R. Hunter.)

A. (continuing): At that time Mr. Schaefer spoke up and said "I have not received any compensation for any extra work I have done on these holes up to date; I don't see where I can receive any from here on out, therefore I do not want anything to do with the structural excavation and fine grading" so we then left this particular [998] area and started back in the car, or walking back to the car, and Mr. Macri and I were talking together, in the presence of the other men, and Mr. Macri said "I will have Mr. Cohen on here the first of this next week to take over, and we'll see that this excavation is done properly"; and Mr. Cohen said that if he came out to handle that work, he would see that it was done properly. Mr. Schaefer said "Well, it remains to be seen what will happen between now and the first of next week."

Q. Now, out on the field at that time, were there some of the structures, by structures I mean the forms for the structures, in place?

A. There was.

Q. And what was the situation with reference to the banks, as to slope and as to clearance between the forms at the bottom?

A. There was no slopes, and the forms that were in in some cases were up against the vertical banks.

Q. Was there anything discussed in this discussion with Mr. Macri about the speed at which the job was progressing?

A. No, I can't recollect as to any discussion there.

(Testimony of Allyn R. Hunter.)

Q. When Mr. Macri testified or said he's paying for the costs, did he say anything about Mr. Schaefer writing him a notice each time that he did some excavating?

Mr. Holman: Just a moment. I object to that, [999] your Honor. The contract calls for that whether he says so or not.

Mr. Olson: I'm trying to find out whether that provision was in this contract.

Mr. Holman: What contract?

Mr. Olson: The one that they're just making out in the field.

The Court: I'll sustain the objection. He can say what was said in the field. I assume there wasn't any such provision. He can tell what the conversation was.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15?

A. I think so. There was some discussion as to lumber, and there was a lot of discussion in Mr. Schaefer's behalf on account of the forms drying out, which they were, badly dried out.

Q. What was said about it?

A. Mr. Schaefer said "If we don't get to going here, I'm going to have to tear all the forms down

(Testimony of Allyn R. Hunter.)

and rebuild them, because they are shrinking and warping so bad that they will have to be worked on."

Q. Do you know about how many structures were ready for pouring [1000] at that time?

A. No, I couldn't say; there was probably a half a dozen that were in the ground, but I didn't go over enough of the area to say how many was in the ground.

Q. In your opinion, Mr. Hunter, how much pouring, that is, how many days' pouring, was there ready when you were there on June 15?

Mr. Holman: Just a minute. I object; he isn't shown qualified, your Honor.

Mr. Hawkins: My point is, in his opinion, how many were ready for pouring; that's a matter of fact, not opinion.

Mr. Olson: Is that what I asked?

The Court: I understood you asked how many forms were ready for pouring of concrete.

Mr. Hawkins: In his opinion.

The Court: In his opinion.

Mr. Olson: Would you read it, please, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I just submit he's not shown qualified, your Honor; just the statement he's an engineer doesn't qualify him.

Mr. Olson: I asked on construction work, and 17, years, he said. [1001]

(Testimony of Allyn R. Hunter.)

The Court: Perhaps you should show whether he's worked on concrete work or not. He might have been building bridges, and working in steel or wood.

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, Mr. Hunter, what has been your experience in this 17 years that you worked in your engineering?

A. I was with the Oregon State Highway Department three years, on various types of construction work, grading, surfacing, black top paving, concrete paving, head walls, bridge work. I then then was with the Bureau of Public Roads in a similar capacity as associate superintending engineer. I then went with Johnson D. Attley, building bridges in the State of Washington, up out of Deerie and Helmer, Idaho, and up out of Wilbur, Washington.

Q. Did you ever work on any irrigation projects, Mr. Hunter?

A. Yes, I was around the Owyhee Project; I estimated four jobs for Eck and Lind, contractors from Portland, Oregon.

Q. What kind of a project was that, those four projects for Eck and Lind?

A. They were similar to the Roza project.

Q. What did they consist of?

A. Drop boxes, head gates, tail gates, weirs.

(Testimony of Allyn R. Hunter.)

Q. And what material was to be put in them?

A. Concrete.

Q. And you say you estimated them; what do you mean by that? [1002]

A. Worked up the bids on these jobs.

Q. Now, in recent years, or when was this Eck and Lind job that you're talking about?

A. 1936 or '37.

Q. 1936 or 1937, and since that time, Mr. Hunter, what has been your connection with construction projects, if any?

A. I managed from 1942 to '45, I managed C. H. Wheeler Construction Company in all types of railroad, highway, airport, bridges, culverts, pipe, and everything else. I had sole management of about several million dollars worth of work.

Q. Did that include concrete work?

A. Considerable.

Q. Now, in connection with your insurance business that you're in now have you had any connection with projects, construction?

A. I've been out on various projects. I've been on the Roza Project with Nat McDougall Company's men.

Q. Now, Mr. Hunter, can you tell us in your opinion how many days', or if there was days' pouring, was there ready as far as structures completed and in the ground, when you were there June 15? Now, counsel wants to object.

Mr. Holman: Just a minute; I object to that question until he adds to the question the facilities for pouring. [1003]

(Testimony of Allyn R. Hunter.)

Mr. Hawkins: Then I think too, your Honor, this witness has testified that he did not see all the structures, therefore his testimony must be partly based on hearsay.

The Court: Well, I'll permit him to answer if he can. Overruled.

Witness: Your, Honor, I wouldn't say that I saw all the structures.

Q. Well, can you answer my question?

A. The structures I saw, there wasn't a half a day's pouring.

Mr. Hawkins: What was your answer again, sir?

A. Of the structures I saw, there wasn't a half a day's pouring. If there had been other forms in the ground out there I didn't see them.

Mr. Hawkins: I move to strike that, your Honor, as not responsive.

Mr. Holman: I'll join, your Honor. It shows the witness's observation and determination is limited to what he saw. He says he didn't see them all.

Mr. Olson: Your Honor, he's given the number of structures he saw. I've forgot what he said, but I'm sure it is in the record as to the number of structures he saw, and how long it would take to pour them.

The Court: I'll deny the motion to strike. It is understood, of course, he's not saying that that's [1004] all there were there. He testified there were 30 to 50 panels around—oh, no.

Mr. Olson: I think his testimony is in there someplace. I can ask him again to save time.

(Testimony of Allyn R. Hunter.)

Direct Examination
(Continued)

By Mr. Olson:

Q. How many structures did you see there, assembled in the excavations, when you were there on June 15?

A. Do you mean that were in the ground ready for concrete?

Q. Yes.

A. Around a half a dozen.

Mr. Olson: Your Honor, I have considerable more questioning of this witness.

The Court: Well, I'll recess, then, until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, March 4, 1947

1:30 P.M.

(All parties present as before, and the trial was resumed.)

Direct Examination
ALLYN R. HUNTER
(Continued)

By Mr. Olson:

Q. Mr. Hunter, at the time of adjournment we were discussing the conversation that took place between Mr. Macri and yourself and others out on

(Testimony of Allyn R. Hunter.)

the project about the middle of June, I think you said it was. Now, just what costs was it that Mr. Macri stated that he would pay for? [1005]

Mr. Holman: Object as having been already covered, your Honor. It is repetitious.

The Court: Well, I'll overrule the objection. I'm not sure that it was covered, what costs he said he would pay for.

Witness: Well, to get my mind on the thing now, Mr. Macri after the discussion, I should say between Mr. Macri and Mr. Schaefer, Mr. Macri brought up that he would take care of any additional expenses or costs pertaining to anything where the Concrete Construction Company was concerned.

Mr. Holman: I move that be stricken as a conclusion of the witness, your Honor.

The Court: I think it is a conclusion, and I'll grant the motion. He should say just the substance of the conversation as nearly as he remembers it, and not draw a conclusion.

Q. My question, Mr. Hunter, is what costs was it that Mr. Macri said he would pay for, and in answering the question, relate as nearly as you can the substance of the statement or statements made by Mr. Macri.

A. Pertaining to the——

Q. To the costs, the expenses.

A. Grading, structural excavation——

Mr. Holman: I object to the witness concluding [1006] what was said. He should state what he said.

(Testimony of Allyn R. Hunter.)

The Court: The question is what Mr. Macri said regarding his payment of the costs, as you remember the substance of the conversation.

Witness: Mr. Macri said "I'll take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you"; then Mr. Macri further said that "no man or sub-contractor has ever lost any money on Mr. Macri's job, and you're not going to be any exception."

Q. Now, when you were there on that date, Mr. Hunter, did you have an opportunity to and did you observe any lumber at the yard?

Mr. Holman: Object as having already been covered, your Honor.

Mr. Olson: Oh, no.

Mr. Holman: Oh, yes. He testified as to lumber.

The Court: I'm not sure that he did. I'll allow him to answer; overrule the objection. He talked about forms; I'm not sure about lumber.

Mr. Olson: Yes, forms and panels, but not as to lumber.

Witness: There was practically no lumber of any consequence——

Mr. Holman: I move that be stricken. [1007]

A. There was no lumber at the yard there that would be enough to make any additional panels, when I was there.

Mr. Holman: Your Honor, I move that be stricken as a conclusion of the witness.

The Court: Oh, I'll permit it to stand. He says very little or no lumber.

(Testimony of Allyn R. Hunter.)

Q. Now, when were you back on the job again, Mr. Hunter, if you were?

A. I was back on the job sometime during—oh, I would say after the 20th of August in 1944.

Q. And what did you see there at that time?

A. That was between 6 and 7 in the evening, as I remember it. Mr. Ratutan of the City Electric Company was with me. We had left Pasco and was on our way up over this job and to Portland. I went out. There was one of the Concrete Construction Company men, so he informed me, there on the job——

Mr. Holman: I move that be stricken, your Honor.

The Court: What somebody else told him will be stricken.

Q. Do you know who he was, Mr. Hunter?

A. I couldn't say, no.

Q. All right; now, what did you see there on that occasion about the 20th of August, 1944?

A. There were practically no forms, there were no forms to [1008] speak of, in the yard; some steel tied.

Q. How about form lumber?

A. It was about as it was the first time; there was, I would say, maybe a thousand or two feet of lumber in the yard.

Q. Do you remember, Mr. Hunter, whether or not there was—what types of lumber were there at that time?

A. I paid no particular attention to the lumber at that time.

(Testimony of Allyn R. Hunter.)

Q. Now, did you notice it as to quality?

A. No, I couldn't say as to the quality of it.

Q. Now, did you examine any of the excavations on that occasion? A. No.

Q. You didn't go out on to the field?

A. It was too dusty. We started out, and come back.

Q. Now, were you on the job again during 1944?

A. I was through the job, oh, it was the latter part of September or first of October.

Q. And what did you observe on that occasion?

A. The day I was through the job, at that time there was no work going on; there was no men.

Q. Did you examine any of the excavations on that time? A. No, sir.

Q. You just examined the excavations on this one occasion, then? A. That's right. [1009]

Q. What in your opinion, Mr. Hunter, is a reasonable required excavation as far as lateral clearance is concerned, in order to install forms for and to remove forms for structures of the type that were to be installed on specifications 1062?

Mr. Holman: Just a minute; your Honor, I object to the question as an improper question propounded to this witness now as an expert. It should be based upon hypothesis which is supported by the evidence in the case preceding the witness's testimony, and his answer should be upon that, otherwise it is immaterial what he thinks, your Honor. If he's called as an expert he should give the answer to the hypothetical question.

(Testimony of Allyn R. Hunter.)

The Court: It isn't I understand it, a hypothetical question based on the evidence, but calls for his opinion as an expert engineer, as to what would be sufficient.

Mr. Holman: That, your Honor, I submit is irrelevant, immaterial, and outside the issues. If he's testifying as an expert it should be on a hypothetical question.

The Court: I think he could tell as an expert engineer what is a reasonable clearance in a structure of this kind. I'll overrule the objection.

Mr. Hawkins: I'd like to add that this witness [1010] has not been qualified to testify on this matter. There is no testimony he is a concrete engineer in any way, shape or form, or had any experience in this type of structure.

The Court: He testified he had considerable concrete experience, as I stated, and also figured on some reclamation structures.

Mr. Hawkins: Not this type.

The Court: Same general type. I think his lack of qualification would go to weight of the evidence rather than admissibility.

Mr. Holman: I would like to add to my objection that the question does not include within its scope the specifications for this job 1062, which are in evidence.

The Court: I thought it was your position that there are no specifications covering slope?

Mr. Holman: That is my position, except as specified.

(Testimony of Allyn R. Hunter.)

The Court: You say they're not specified, and if they're not, then it is a question of what is reasonable, regardless of specifications.

Mr. Holman: That's correct, your Honor, but so far as this witness is concerned, the question which does not include the specifications leaves him latitude beyond the Court, that is, asking him to substitute his [1011] judgment for the court's judgment.

The Court: I don't quite get your point yet, Mr. Holman.

Mr. Holman: My point, your Honor, my direct point, is that the only proper way to interrogate an expert witness is upon a hypothetical question, and the hypothetical question must have the elements which are involved in the litigation and before the court.

The Court: Well, I'll overrule the objection. Proceed.

Mr. Olson: Would you read the question?

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: I hate to keep interrupting, your Honor, but I object to that because the language used by counsel is not the language contained in the specifications. There is no testimony here whatsoever that the excavations were to be made according to the language that counsel has used, the exact language, which I think should be incorporated, is "the required excavation between vertical planes,"

(Testimony of Allyn R. Hunter.)

not what is reasonably necessary from the standpoint of the Concrete Construction Company. I think they're two different things.

The Court: Well, isn't it your position, Mr. Hawkins, that there is no required excavation here?

Mr. Hawkins: My position is, your Honor, that the specifications merely require the defendants Macri to excavate an excavation that is required for the structure.

The Court: All right, what is required? What is your position as to what is required?

Mr. Hawkins: Whatever——

The Court: Whatever is reasonable for that structure.

Mr. Hawkins: Whatever is reasonable for that structure, yes, that's right.

The Court: Well, if this man is an engineer and knows the structure, can't he say what is reasonable?

Mr. Hawkins: That gets back to the point I was about to make. There's been no testimony this man has familiarized himself with the structures required by the specifications, which of course are set forth in great detail, and there is no testimony that this man examined any more than a half a dozen of the structures in the excavation, and therefore I think it is improper for him to answer the question.

The Court: I think there might be some objection on that score. I think he said he went around and saw some of these forms in place, but you might

(Testimony of Allyn R. Hunter.)

interrogate—I'm not suggesting what you do, but it seems to me it might subject him to the objection that he hasn't shown [1013] himself to be sufficiently familiar with the type of structures to be installed in that area. I'll sustain the objection for that reason.

Mr. Olson: I was going on the assumption that he was familiar with the structures.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Hunter, did you examine, have you examined the specifications, including the structure layout plans, relating to specification 1062?

A. I did before the job was bid.

Q. And are you referring to plaintiff's Exhibit 12, and plaintiff's Exhibit 3?

A. This is 1062 here; yes.

Q. In what connection did you examine those specifications and the structure layout plan, Mr. Hunter?

A. Before Mr. Schaefer had turned in a bid on this project I stopped by his office in Portland, and we discussed it quite considerable one evening before he turned in this bid, as to the layout and structures, the grading, structural excavation.

Q. And did you or did you not have those structure layout plans with you when the trip was made to the job on June 15?

(Testimony of Allyn R. Hunter.)

A. Fred Waltie had them with him, and I went into them at that time with Mr. Schaefer and Mr. Macri. [1014]

Q. Are you familiar, then, Mr. Hunter, in general with the structure layout plans and the general type of structures which were to be installed and which have now been installed on this 1062?

A. I feel that I am.

Q. Now, do you have in mind the question which I asked you previously about the lateral clearance? I'll re-ask the question. Mr. Hunter, having in mind, then, the structures that you saw, that is, the structure forms which you saw on the job 1062, and having in mind the structure layout plans, being plaintiff's Exhibit 12, and the specifications, being plaintiff's Exhibit 3, what in your opinion would be the reasonably required lateral clearance of the excavation from the structure to the bank in order to properly enable the installation of forms for these structures and the removal of the form panels after the installation or the pouring of the concrete?

A. Well, I would say, as has been said before, one foot out from the outside of the forms, and from a one to one or one and a half to one slope.

Q. And why do you say that, Mr. Hunter, and upon what do you base your opinion?

Mr. Hawkins: Just a moment; your Honor, I object to that. [1015]

Mr. Holman: It is a matter of cross-examination of an expert's answer, your Honor.

(Testimony of Allyn R. Hunter.)

The Court: Well, I think he may explain his answer. Overruled.

Witness: I think the excavation, structural excavation, has to be set out one foot from the outside of the forms to give your carpenters, your form setters, enough room to set their forms in and with enough slope to keep it from caving in, and making it easier for all around construction of the structures for the carpenters, so that they can expedite it.

Q. Now, is there any relation between the required lateral clearance and the removal of the panels? A. There is.

Q. Will you explain that, Mr. Hunter?

A. If you don't have enough room on the outside, you wreck your panels, your forms, taking them out, and it takes considerable more time to get them out where you don't have room.

Q. Is there anything else about that, any other reasons you have, Mr. Hunter, for saying that that lateral clearance is reasonably required in the structures?

A. It is nothing more than good construction practice.

Q. Now, assuming, Mr. Hunter, that the excavations were made with a lateral clearance at the foundation of the [1016] structure of one foot, with a sloping bank of 1 to 1, and assuming further that the excavations were fine graded as to the floor of the excavation in such a manner as they are ready to receive concrete as called for by the structure

(Testimony of Allyn R. Hunter.)

layout plans, and assuming further that form lumber is available in proper quality and in proper time for the making of structure forms, and assuming further that the excavations are made and available in sufficient time to permit the person who is assembling the forms and installing the structural forms and pouring the concrete to proceed without interruption, what, in your opinion, would be the length of time reasonably required to complete the making of forms, the pouring of concrete, removal of the forms on the job referred to here, 1062, covered by plaintiff's Exhibit 3 and the structure layout plans, covered by plaintiff's Exhibit 12?

A. I made a statement to Mr. Schaefer——

Mr. Hawkins: Well, your Honor, I object to that as not responsive.

The Court: No.

A. I would say somewhere around 70 to 75 working days would have completed that project.

Q. Your answer is 70 to 75 working days. Now, Mr. Hunter, assuming that the excavations instead of being excavated in the manner described in my previous question, are [1017] excavated so that the walls or the banks are vertical, and so that the carpenters were required to do fine grading or hand excavation on the bottom of the excavations in order to form the floor of the excavation, so as to be ready to receive concrete, and assuming that the lateral clearance was lacking to the extent that the form panels, outside form panels, were flush with the banks, and in many instances the carpenters had to excavate the banks in order to place the strong-

(Testimony of Allyn R. Hunter.)

backs in place, and assuming that because of the lack of lateral clearance many of the form panels were damaged and had to be re-made, and assuming further that the excavations were not made sufficiently ahead of the carpenters to permit their continued operation without delay, and assuming further that the lumber furnished on the job was not furnished at such times as to permit the orderly completion of the forms, and assuming further that the same job, 1062, instead of being completed in your 70 to 75 working days, extended over a period of some twelve and a half months, having been commenced on March 13, 1944, and not completed until the following April 8 of the next year, 1945, what effect would that have, Mr. Hunter, on the cost of the work in completing this same structure work?

Mr. Hawkins: Your Honor, I certainly object to that question. I don't think this witness is qualified [1018] to testify as to costs. He hasn't been in the construction business for a long time and is not familiar with the costs as they existed at the time in question; furthermore, the question has not been embodied with proper exactitude all of the elements necessary for the determination of what the cost would have been; thirdly, on the ground that it is purely speculative. There is absolutely no way of telling what such costs would or might have been. It is uncertain and can only be guessed at at best, and the guess of this expert is certainly no better than the guess of myself or anyone else.

(Testimony of Allyn R. Hunter.)

Mr. Holman: And I would like to add that the hypothetical question did not state that notice had been given currently to the principal contractor of the sub-contract.

The Court: Is the purpose of this question one that will elicit a qualitative or quantitative answer? Are you asking what effect it would have to increase the cost, or do you intend to bring out the dollar and cents amount that it would increase it?

Mr. Olson: I do not expect this witness to reply with a dollar and cents answer, your Honor. As a matter of fact, I would be astounded if he does. I simply want to show the effect.

The Court: Well, I'll overrule the objection, if [1019] it is merely to be a qualitative answer.

Q. Do you have in mind the question, Mr. Hunter? A. Part of it, at least.

Q. If there is any question about it I would like to have the reporter read it. If you have it in mind proceed.

A. If I can answer it in this way; the time element alone I would think would make it two or three times more than it would be if the job could have carried through.

Mr. Hawkins: Your Honor, I move that be stricken. That is certainly a quantitative answer. He can state that it might increase the cost, or would have.

The Court: I think that is different. I take that to mean that it would increase greatly, the matter of delay. I'll overrule the objection.

(Testimony of Allyn R. Hunter.)

Mr. Holman: I would like to move that the answer be stricken, your Honor, as one prohibited by the terms of the contract in evidence, and therefore immaterial.

The Court: I'll deny the motion to strike. Now, let's see, he's answered so far as to the matter of time delay. Did I understand the answer correctly, that he's testified as to what the effect of delay would be?

Mr. Olson: Yes, the time alone, he said.

The Court: That's right.

Q. Now, would you proceed, Mr. Hunter, with answering the balance of my question, if you have it in mind? [1020]

A. Well, I think that I would say as I said before, that two or three times as much as the original expected cost would be.

Mr. Hawkins: I again object to that, your Honor, and move that the answer be stricken, because it is a definite mathematical answer, twice the cost, which these people will later be able to show. I don't think that is proper at all. He can testify that it would increase the cost, but how could he tell from the facts enumerated in this question whether it would increase the cost half as much, 25 per cent, 50 per cent, 200 per cent? He hasn't stated how many days the carpenters were delayed, how many structures were involved, what the cost of materials were at that time, and so on. Now, it seems to me that the elements in the question make it impossible for this witness to make a state-

(Testimony of Allyn R. Hunter.)

ment of that kind, based solely upon the elements in the question. I think without any shadow of a doubt the witness is calling upon his memory of what the job looked like at the time he was there, when he gives this testimony. I don't think he's confining himself to the elements mentioned by counsel at all. If he were, it would be impossible to say two or three times.

The Court: I'm assuming he's confining himself to the elements of the question, but I will grant the motion [1021] to strike two or three times. It doesn't seem to me it would be possible to make a definite opinion statement as to what the increased costs were.

Mr. Olson: Your Honor, isn't that a matter for counsel to go into in cross-examination? I intend, your Honor, to show what our actual costs were on this job, as I stated once before, by a certified public accountant. Now, it seems to me I'm entitled to substantiate their actual figures with expert testimony that the costs would be increased in that approximate amount by this delay and the extended time, the manner of excavation, and those things I mentioned in my hypothetical question. When you say "two or three times" certainly that's not putting your finger on a certain dollar, but there are certain elements considered and certain limits within which an expert witness can encompass the cost.

The Court: I thought he said two times, this last time.

(Testimony of Allyn R. Hunter.)

Mr. Olson: If he did, I didn't catch it.

Mr. Hawkins: I thought he said two or three, if I remember correctly, but in this case that is a variation of about \$50,000.00.

Mr. Olson: No, it isn't.

Mr. Hawkins: Well, it is a variation of a substantial sum, at any rate, your Honor. How can anyone [1022] give an answer of that kind based upon the question that counsel has just put to the witness? It is humanly impossible for one to look at that hypothetical question alone and say that it would increase the cost two times, or three times.

The Court: Well, I'll strike the answer. I think he may say whether it increases it substantially, or greatly, or something of that sort, but not a definite amount.

Mr. Hawkins: It would depend upon the extent of the delay, and the extent of lack of materials, and all the rest of it, which hasn't been testified to in any way, shape or form as yet.

Q. Mr. Hunter, having in mind, then, the hypothetical question which I propounded to you last, state whether, or how, that would affect the cost of performance of the preparation of the forms and their installation in the excavations.

Mr. Holman: Same objection previously registered.

Mr. Hawkins: There's been no testimony in this record whatsoever as to the extent of delay, the extent of lack of materials, as to the delay with respect to the respective structures erected out there. I don't think there's been any evidence on

(Testimony of Allyn R. Hunter.)

which counsel could base a hypothetical question.

The Court: Not detailed, but a good deal of general evidence.

Mr. Hawkins: There's been evidence that the lumber has been delayed, but there is no evidence from which anyone could arrive at any figures.

The Court: I'll overrule the objection.

Mr. Olson: I wasn't through with the question, your Honor.

(Whereupon, the reporter read the last previous question.)

Q. (Continuing): the pouring of concrete in the forms, and removal of the forms after the concrete was poured.

Mr. Holman: The objection continues, your Honor. Same objection.

The Court: Yes, the record will show that the objection stands to this question the same as made to the prior one.

Mr. Holman: I would like to add now that it is also prolix, this question; it asks for several different things, it asks for at least three or four answers, your Honor.

The Court: Well, he's asking how it would increase the cost. He may answer.

Witness: In the first place, it would increase your labor cost immediately. You have your equipment rentals, [1024] your fixed overhead, your general delay——

Mr. Ivy: What was that last?

A. ——general delay; interest.

(Testimony of Allyn R. Hunter.)

Mr. Holman: That's interest on money?

A. On money.

Q. Are you able to state, Mr. Hunter——

Mr. Holman: Now, your Honor, I move that the answer be stricken as not responsive to the question.

The Court: Overruled—denied, rather; it's a motion to strike.

Q. Are you able to state, Mr. Hunter, in view of your education as an engineer, and your experience which you have related in the record, within the confines of some limits the numbers of times that the cost would be increased by virtue of the matters set forth in the second hypothetical question which I propounded a while ago?

Mr. Hawkins: I object to that, your Honor please, for the reasons already stated. There isn't a single item specified in any of the questions counsel has asked from which he can determine any figure. Now, maybe all these delays that counsel speaks of, and all this lack of material, is insufficient to cause any actual delay. So far as we know all the workmen Schaefer had on the job were busy all the time. There isn't a bit of evidence to the contrary. It's true his carpenters were digging when [1025] they should have been building forms, but there is no evidence whatsoever that they were idle. I think the question is improper for those reasons.

The Court: Mr. Olson?

Mr. Olson: Of course, when counsel says that there is no evidence of any delay on this job, I'm

(Testimony of Allyn R. Hunter.)

truly astounded. The testimony is, your Honor, that for five weeks our men were pulled off of the job. The testimony is further that they went out there to put in these structures, and they had to start excavating, and that from March 13 until 'way into April, the first excavation that was ready for putting in structures was on April 15, and even then when they were notified it was ready, it wasn't ready; that they kept on working, and got down to May 19, and their progress was so slow, they had been doing so much digging, that they pulled off of this job and were off of it until the 29th of July, and they said because there was no excavations ready. Their testimony is, your Honor, that they continuously had to wait for lumber in the yard, that the carpenters when they came up on these holes, they weren't ready, and instead of going ahead and doing their form work they had to do this excavating. Their testimony is further that in taking out these panels, instead of being able to move them down to the next excavation, they had to take them back to the yard [1026] and remake them; that the fine graders in many instances were working in the same holes, that they had to get them to come back to do this fine grading with the carpenters at the holes. The testimony is, your Honor, that had these things been done as they should have been done, this job could have been performed in four months, 70 to 75 days by this witness; other witnesses say four months. Now, how counsel can say that there is no evidence, your Honor, of any delay, I don't understand.

No. 11707

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as
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Transcript of Record
In Five Volumes
VOLUME III
Pages 949 to 1428

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

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PAUL P. O'BRIEN
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(Testimony of Allyn R. Hunter.)

The Court: He isn't saying that. He's saying that there's no evidence of any definite time or any evidence of definite quantity or amount or time on each of these various elements that have been testified to that caused the delay.

Mr. Olson: That's correct, your Honor.

The Court: It is not shown how many hours are lost on one structure or another one, and so on. I think that is his point, that since there isn't a detailed definition of the evidence, that there couldn't be any exact opinion evidence as to the amount the costs have been increased.

Mr. Olson: Yes, but your Honor, the thing they are going on is that they want to segregate it, they want to take the contract price of so much and then place a separate and distinct value on those delays, and that's [1027] not the theory of our case. We're not limited to that, and they know, as we do, your Honor, that it is a physical and practical impossibility for anybody on this job to divide between the time it takes to put that form in how much of their time that they spent as carpenters in putting in the form if they hadn't been hampered by that bank, and how much of the time on each excavation was used up because of the bank being in the way, and the hole not being ready, so we go on this general testimony, your Honor, that had these things been done right, and I realize I'm using that word "right" loosely, but the Court understands me, that it could have been all done in four months, which, your Honor, wouldn't have carried this job over the

(Testimony of Allyn R. Hunter.)

winter, and it is by virtue of the fact that instead of being able to do that we were held up thirteen months, I'm asking this witness if he can't evaluate within the confines of two or three times. If he can come that close to it, now, if the witness can, and he's an expert, if they can tear down his testimony on cross-examination let them try. Counsel says he can evaluate that cost just as good as this witness can. Maybe he can; I can't. It seems to me it is proper to go into that for the purpose of substantiating in a general way what our costs were on this project.

Mr. Hawkins: The plaintiff comes into court seeking [1028] to recover a certain amount of money, and it seems to me in this case as in all cases it must be established to a reasonable certainty what that figure is. I contend it cannot be done in the manner in which counsel is trying to do it. As a matter of fact, the State Supreme Court has held in many cases that even though there is a breach of contract and there is some damage flowing from it, if the damage is too speculative and uncertain, no substantial allowance of damage will be made. There has been no showing here whatsoever that the Concrete Construction Company had any prior experience with this type of construction, and that they could have performed it for a certain cost. That is purely in the realm of speculation, what they could have done this job for had Maeri done so and so. It is just simply guess-work, nothing more or less. Along that line, our Supreme

(Testimony of Allyn R. Hunter.)

Court, in quite a line of cases, has held that where the damages are speculative, no recovery can be had. *Binham vs. Walla Walla*, 3 Wash. Terr. 68; *Webster vs. Beau*, 77 Wash. 444; *Lockit Cap Co. vs. Globe Mfg. Co.*, 158 Wash. 183; *Hole vs. Unity Petroleum Corp.*, 15 Wash. (2d) 416. In each one of these cases there was a breach of contract preventing the other party either from performing the contract or doing certain things. In each one of those cases the Court held the damages were too [1029] speculative to be allowed, because they couldn't be ascertained with reasonable certainty. I submit to the Court here we have an expert witness testifying in response to a hypothetical question, and purporting to give with some degree of mathematical certainty the increased cost. I contend on the matters set forth in the question, indeed, on this record, no one, no matter how well qualified he is, could testify how much the costs were increased or how much less they would have been had it been done according to the specifications. I submit while it is true in many instances it is merely a matter of cross-examination to bring these points out, in this case there is not sufficient testimony of sufficient mathematical exactitude for this witness to base such an answer as counsel is calling for, and I submit, therefore, that the question is wholly improper, and our objection to it should be sustained.

Mr. Ivy: Your Honor please, the position of the bonding company was set forth in the brief

(Testimony of Allyn R. Hunter.)

that I handed to the clerk for you earlier in the case. The statement of counsel that they are unable to segregate the costs that they are alleging in their first cause of action by reason of the oral contract clearly brings this case within those cases cited to your Honor. It would seem to me that as far as the bonding company is concerned, in [1030] view of the statement of counsel to the Court in his argument, the bonding company cannot be held for damages under the cases already cited to your Honor. Their bond is a performance bond for labor and material, and not for damages, even though their alleged damages are measured by labor and material over and above what they would have been required to incur had they been able to proceed under the ideal conditions or the normal conditions that they anticipated. Certainly in view of the statement of counsel the bonding company should be dismissed from the case, because counsel has admitted to your Honor that he is unable to segregate the labor and material under which the bonding company and its performance bond could be held.

Mr. Olson: Your Honor, in answer to that, I didn't make any such statement, that I could not segregate labor and materials; neither did I use the word "damages". If I were suing for damages for breach of contract, I've got a lot of damages we sustained that are not in this case, just a lot of them. The thing I'm suing for, I'm suing for labor and materials and services that went into this job,

(Testimony of Allyn R. Hunter.)

and the bonding company is liable for every cent of it. Now, the statement I did make, your Honor, that it is impossible to take your contract and say that it covered for a certain amount of [1031] labor and materials, and to divide, structure by structure, the part of the services rendered that were rendered if the sub-contract had been complied with by Mr. Macri and the amount of them that were the result of his non-compliance, but I am able to show the cost and the reasonable value of the services and materials that went into this job, and were required to go into it by virtue of Mr. Macri's failure to comply with his contract, not on the theory that it is damages for his breach; it is our position that by reason of his failure to perform this contract, that contract went out the window. I take this position on two grounds; first, that there was an oral agreement, all the testimony isn't in on that, which in itself abrogated the contract. It is our position that even in the absence of the agreement, when Mr. Macri failed to live up to his part of the contract, that contract became abrogated, and that we are then entitled to sue on the theory of quantum merit for the labor, materials and services that went into this job. If this witness can testify to it, your Honor, within those confines, he's entitled to do it. If I put Mr. Schaefer and our accountant on the stand and simply testify to the costs, is it to be believed that there is no way at all to check those figures? They intend to show our costs were out of line and we didn't know what

(Testimony of Allyn R. Hunter.)

we were doing. It is to meet [1032] that contention that I want to show by these experts that our actual costs were to be reasonably anticipated and expected by virtue of the fact that this job was held up this length of time.

The Court: Will you read the last question?

(Whereupon, the reporter read the last previous question.)

The Court: I'll overrule the objection.

Mr. Hawkins: For the purpose of the record, counsel's argument suggests another theory I would like to submit at this time. Goerig and Philp under the termination agreement agreed to pay any financial loss to Mr. Macri, sustained by him by virtue of the prompt fulfillment of his contracts. Now then, if counsel's position is based either upon a breach of this original written contract or upon a breach of an oral contract made sometime later, we, Goerig and Philp, cannot be bound to the plaintiff, because the very condition under the termination agreement upon which our liability would arise must of necessity not obtain; that is, if Macri failed to perform, then Goerig and Philp are not liable, under the very wording of the termination agreement, and therefore we again object.

The Court: Of course, I'm not decided the lawsuit or any part or portion or phase of it at this time. [1033] I'm simply trying to determine what is material to be allowed here by way of evidence bearing on the issues, and if this is material as to

(Testimony of Allyn R. Hunter.)

any party, it should be permitted to go in, and the effect will have to be determined afterwards.

Mr. Holman: Since my co-defendants have taken various positions, I would like to state with respect to Macri that we move this question be stricken on the ground and for the reason it is not predicated upon written notice of any cost as required by the sub-contract.

The Court: Well, it will be denied, the motion to strike.

Mr. Olson: He hasn't answered it yet.

The Court: Well, I suppose he was referring to the preceding answer.

Mr. Holman: I understood he had answered.

The Court: No.

Mr. Holman: Well, then, I'll withhold that until he does answer.

The Court: All right, you may answer. The question is whether you can express an opinion.

Witness: I feel that a person could express it; I feel I can express it.

Q. Well, then, will you do so now, Mr. Hunter?

The Court: And the record will show that the same [1034] objections are made to this as to the preceding question.

Witness: I feel that it would raise your costs from two to three times.

Mr. Holman: And the motion to strike, your Honor, is directed to that.

The Court: It will be denied.

(Testimony of Allyn R. Hunter.)

Q. Now, Mr. Hunter, having in mind the structure layout plans, plaintiff's Exhibit 12, and the specifications covered in 1062, plaintiff's Exhibit 3, and assuming that the lumber was furnished on time and of a suitable quality for the work as called for by the two exhibits mentioned, and assuming that the excavations were made with the lateral clearance of at least a foot on the foundation of the structures and with a slope to the bank of 1 to 1, and made available so that the structures could be put in place without delay, and in short, so that the job could have been completed, as you testified before, in your 70 to 75 working days, what in your opinion, Mr. Hunter, would be the reasonable cost or reasonable value of the concrete installation, concrete pouring into the structures, the building of the forms, and the removal of the forms, and the stripping operations, and including the furnishing of the curing materials and the furnishing of the form wire and nails?

A. That didn't include the aggregate or cement?

Q. Not including furnishing the aggregate or cement.

Mr. Hawkins: I didn't know the question was completed, your Honor. Would the reporter read the question again?

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: Well, I object to that question, your Honor. I don't know what the reasonable value of those items has to do with this case.

(Testimony of Allyn R. Hunter.)

The Court: You're asking for cost or value. Did you have in mind cost, or value, or both?

Mr. Olson: Well, I have in mind the value, your Honor. Frankly, I have in mind the Miller Act. The Circuit Court of Appeals case uses the same language; that's exactly what they used, cost or value.

The Court: Do you have an objection, Mr. Holman?

Mr. Holman: Yes, I do, your Honor. I object for the reason that the hypothetical question does not incorporate the plans and the specifications and the sub-contract, which incorporates the principal contract by reference in its entirety, and the specifications. In other words, this witness is being asked what the job would be, done without regard to the specifications.

The Court: I thought it was based upon his knowledge of the specifications. [1036]

Mr. Holman: This question did not.

The Court: Read it again. It did, I'm sure. You said based upon your knowledge of the specifications and lay out plans.

Mr. Holman: It's hard to keep it all in one.

(Whereupon, the reporter read the first portions of the last previous question.)

The Court: That's enough; the objection is overruled.

Mr. Holman: But it still doesn't take the sub-contract in, your Honor. I have this in mind. If counsel is asking this hypothetical question based

(Testimony of Allyn R. Hunter.)

upon the assumption that the sub-contract has been superseded by some oral agreement, then that is one thing, but if he's basing it upon the sub-contract rights with due regard to the specifications, then the question is deficient in that.

The Court: Overruled.

Mr. Hawkins: And your Honor, this witness is not qualified to testify as to the value or cost of these materials. There is no testimony he was operating on that market at that time, or had any knowledge of it.

The Court: Well, he's testifying as an expert engineer and construction man who for many years had charge of a construction company. I assume that he's [1037] qualified as an expert. Overruled.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you have in mind the question, Mr. Hunter?

A. I think I have, yes. Well, I think that the bid which was made out by Mr. Schaefer, which I saw myself at the time the bid was made out, was ample——

Mr. Hawkins: Well, I object to that.

Mr. Olson: Let's let him finish.

Mr. Hawkins: It is not responsive.

Mr. Olson: Well, it might be.

Mr. Hawkins: Will you let me complete my motion, counsel? It shows that this witness is bas-

(Testimony of Allyn R. Hunter.)

ing his opinion solely upon Mr. Schaefer's bid, and upon what Mr. Schaefer thought was proper under the circumstances at that time.

The Court: Well, he didn't finish. I suppose he was going to say that was his opinion of what the value would be, but his opinion, I think, should be expressed without reference to the contract bid.

Mr. Hawkins: Yes, that's true if he has one independent of the amount bid.

The Court: Yes, that's true. Perhaps you had better ask the question again.

Mr. Olson: I take it the answer is stricken, is that right? [1038]

The Court: Yes, that portion of it is stricken.

Direct Examination
(Continued)

By Mr. Olson:

Q. Well, then getting back to the question which I propounded, Mr. Hunter, what in dollars and cents would be your answer?

Mr. Hawkins: Well, your Honor, I object to that. This witness doesn't know how much was furnished out there. There is no testimony, in fact, in this whole record as to how much material was out there, or how much work was done, and this man testified he only saw six or seven of those structures out there; how on earth can he possibly know and testify to a thing of that kind?

The Court: He's testified he's gone over the plans and specifications, including the layout, and

(Testimony of Allyn R. Hunter.)

knows what is required. I've ruled that he is an expert engineer. He'd be qualified to testify what in his opinion would be the cost or value of these concrete structures under counsel's question, and I'll overrule the objection and let him answer.

Q. Will you proceed, Mr. Hunter?

A. At the time this job was estimated I worked up the figures myself on it, and had somewhere in the neighborhood of \$26.00 or \$27.00 as a final figure; that is excluding the aggregates and cement and lumber.

Mr. Holman: I move that answer be stricken as [1039] not responsive.

Mr. Olson: Let me follow that up.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Is that, in your opinion, Mr. Hunter, the fair and reasonable cost or value of those services referred to in my question? A. It is.

Mr. Olson: You may examine.

The Court: I assume that \$26.00 or \$27.00, was that a cubic yard of concrete? I just want to be clear on it.

A. Cubic yard.

Q. (By Mr. Olson): Does that refer to cubic yard of concrete? A. Cubic yard.

Mr. Olson: You may examine.

(Testimony of Allyn R. Hunter.)

Cross-Examination

By Mr. Holman:

Q. In your answer to the last question, Mr. Hunter, when you say the bid price of \$26.00 per cubic yard is a fair price as of the time of the operation under the contracts, do you refer to item 12 of the bid items, or do you refer to all of the operations assumed under the sub-contract by Mr. Schaefer?

A. That takes the forms, concrete pouring and finishing all into—— [1040]

Q. Would you answer my question, please? Do you refer to item 12, which is concrete structures, among the bid items in the contract and specifications, or do you refer to all of the work assumed by Mr. Schaefer under the sub-contract?

Mr. Olson: That question is objected to, your Honor, as not being proper in that it relates—I'm objecting particularly to that part "does it relate to all of the obligations assumed by Mr. Schaefer?"

Mr. Holman: I said all the items.

Mr. Olson: We don't know what they are, and can't be told from that question.

Mr. Holman: This witness has said that he made Mr. Schaefer's bid up, that he went over it with him at the time.

The Court: That answer wasn't permitted to stand.

Mr. Holman: Oh, I forgot that.

(Testimony of Allyn R. Hunter.)

The Court: He said he went over it and made estimates at the time; he didn't relate it to Schaefer's bid. He concluded that \$26.00 or \$27.00 was a reasonable figure.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Yes, but what I want to know, is that \$26.00 or \$27.00 confined to item 12, concrete structure, or does it include the items undertaken by Mr. Schaefer's sub-contract? [1041]

A. The items undertaken by Mr. Schaefer's contract.

Q. All right, then. Mr. Hunter, I believe you said you were the owner of Rogers Insurance Agency in Portland? A. Yes, sir.

Q. And as such you wrote the indemnity bond to Mr. Macri on the sub-contract in question here, correct?

A. I wasn't the owner at that time.

Q. Oh, not as such, but you did write the bond?

A. Yes, sir.

Q. Handing you Macri's Exhibit 34, is that the form and the manner of execution in which you wrote and delivered that bond?

Mr. Olson: This is objected to as being wholly immaterial, and proves no interest in this case.

Mr. Holman: That is a matter of interest of this witness, your Honor, how he wrote that bond.

(Testimony of Allyn R. Hunter.)

The Court: It is in evidence here; I'll overrule the objection. I don't see the materiality of it.

Witness: I didn't deliver this bond to Mr. Schaefer.

Q. You didn't, sir? A. No, sir.

Q. So you wouldn't know?

A. It was mailed by Mr. Rogers.

Q. So you do not know the particulars?

A. Of the bond? [1042]

Q. Yes. A. I did, yes.

Q. And did you know it was delivered without the principal signing it?

Mr. Olson: Same objection, your Honor. There is no suit on this bond here.

Mr. Holman: No, there is not, but I'm going to the question of the interest of this witness.

The Court: Would he be more interested with an unsigned bond than he would be with one that is signed?

Mr. Holman: Not yet, your Honor.

The Court: I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you negotiated and consummated this transaction of the bond, did you not?

A. Yes, sir.

Q. Do you have with you or can you produce the application for that bond?

(Testimony of Allyn R. Hunter.)

Mr. Olson: I submit the same objection, your Honor. I don't see any materiality.

Mr. Holman: Well, I intend, your Honor, to show by this witness a definite interest in the results of this case, from that very question.

The Court: Well, I'll permit you to pursue it further, then. Overruled. [1043]

Witness: I couldn't say as to whether I could produce that or not. I would have to go to the bonding company.

Q. You do not have it with you?

A. No, sir.

Q. Can you produce that, sir?

A. I'm not sure what the bonding company's attitude is on those applications at all.

Q. Did you secure the application?

A. I think it was sent with the bond, and probably mailed back.

Q. Did you have Mr. Schaefer sign an application for the bond, sir?

A. I didn't personally, no.

Q. Who is the person who would have the application, Mr. Hunter?

A. The Glens Falls Indemnity Company.

Q. Yes, and where would that be with respect to subpoena?

A. Either in San Francisco or New York.

Q. Do you have any copy in Rogers and Company?

A. We do not.

Q. Can you tell me whether or not—did you see the application, sir?

A. I don't think I did.

(Testimony of Allyn R. Hunter.)

Q. Do you have the form of application that you used for the Glens Falls Indemnity Company bond?

A. I don't have one with me.

Q. Can you produce one?

Mr. Olson: Your Honor, I don't see——

Mr. Holman: My point is this——

The Court: Just a moment; Mr. Holman?

Mr. Holman: That the Glens Falls Indemnity Company, just as already illustrated to your Honor by the Continental Casualty Company, has in its possession an application for this bond, and judging from what is now before your Honor in the Continental Casualty Company, that application itself contains an assignment of all interest of Schaefer, and that's what I want to produce.

Mr. Olson: Your Honor, I don't know of any assignment of all interest that appears here as far as the Continental Casualty Company is concerned; in the application for the bond Macri agreed to indemnify the Continental Casualty Company against any loss. Now, if Glens Falls Bonding Company was a party defendant, and this bond was being sued upon, and they had something at stake, some possible judgment entered against them, then I think counsel would be able to show the witness's interest, because he would be trying to protect the bonding company. Nobody's suing the Glens Falls. He completed this job, and having completed it, the bond certainly must have been exonerated, because there is no [1045] claim against them. I fail to see any interest. When he went

(Testimony of Allyn R. Hunter.)

out on the job, there was a contingent liability on the job, but now the work having been completed, there is no contingent liability, or they would be suing on it.

Mr. Holman: I would like to make the request now, into the record, while he's here and available under the jurisdiction of this Court, that he produce a copy of the application for bond of Mr. Schaefer for part of the defendant's case.

The Court: Well, I'd have to have some indication of its materiality. There is no contention but what this sub-contract has been completed, is there?

Mr. Holman: No, not at all, your Honor, but there is a contention as to whether or not the proceeds of the sub-contract have been assigned to the Glens Falls Indemnity Company.

Mr. Olson: Is it your contention that the Glens Falls Indemnity Company have advanced some money on this case?

Mr. Holman: I strongly suspect it, yes, but I can't prove it.

Mr. Olson: Your suspicions are entirely unjustified.

The Court: I don't believe your application for the copy of the bond application is timely, Mr. Holman. [1046] You should have made application for that before the trial, it seems to me, if you had this thought in mind, and inquired into it then.

Mr. Holman: I couldn't, your Honor, because until the surety, the Glens Falls Indemnity Company, presented themselves in some form, I had no way to put process on them. They were not a party.

(Testimony of Allyn R. Hunter.)

The Court: I can't inquire into collateral matters with each witness. You can ask him if it's been assigned to his company.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Does the application contain an assignment clause?

Mr. Olson: I object.

The Court: I think that is objectionable. It might have an assignment clause. The question is whether this man's company has an interest in this lawsuit.

Q. Are you in position to answer for the Glens Falls Indemnity Company, or were you just a general agent? A. I'm a general agent.

Q. I submit he's not in a position to answer, your Honor. Mr. Hunter, you said you were with the State Highway Department in Oregon?

A. Yes, sir.

Q. When? A. 1922, '23 and '24. [1047]

Q. And what capacity?

A. Started in as an inspector, instrument man, assistant resident engineer, and resident engineer.

Q. Then at least for the time that you became a resident engineer for the State of Oregon you had to do with contracts and specifications, did you not, Mr. Hunter? A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. And I believe you said you were—I can't read my own writing—you had an engineering capacity with the Bureau of Public Roads?

A. Superintending engineer, engineering superintendent, I think it is called.

Q. That would hold through there also?

A. Yes, sir.

Q. And when were you with the Bureau?

A. 1925-6-7.

Q. Yes, sir. Then you spoke of the Owyhee Project; that is an Idaho project, is it?

A. It is an Oregon project. It is a Bureau of Reclamation project.

Q. Reclamation project, yes, sir, and you had to do with the specifications in making up your estimates for Eck and Lind on that, did you not?

A. Yes, sir.

Q. Now, with respect to your engineering experience in those [1048] fields, can you tell me whether or not it is customary to measure quantities by computation as against actual measurement in the field, from the engineering viewpoint?

A. It is done in bridge work, culvert work, and such as that; in lots of cases it is by actual excavation, and some places by computations.

Q. For instance, in through cuts, in highway cuts, it would be measured by quantity?

A. Cross section.

Q. And average in areas, would it not?

A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. And that is regardless of either overbreak or under-excavation, is it not?

A. Not in all cases, no, sir.

Q. Now, there is also the element of swell of earth and swell of rock and settling of earth that is involved too, isn't there, in those computations?

A. In some specifications they require an overbreak and a swell. In some cases they don't.

Q. Yes, sir; those things are all taken into consideration in computation to determine pay quantities, are they not?

A. Yes, sir.

Q. And in those instances it is the determination of the computation, and not the actual field measurement, that determines, correct? [1049]

A. No.

Q. That is not correct, sir? You say they would measure overbreak in solid rock, and pay?

A. They allow in the specifications, as a rule, they have an item for so much overbreak, in some specifications. Other specifications they don't allow any.

Q. They measure to neat lines, do they not, sir?

A. They measure to slope lines.

Q. They measure to slope lines?

A. To slope stakes; might not be——

Q. Don't they generally measure to neat lines, and haven't they in all your experience?

A. Not in your grading excavation.

Q. Not in your grading excavation?

A. No, sir; in your structural excavation they do measure it.

(Testimony of Allyn R. Hunter.)

Q. You state that as an engineer, that's the practice?

A. In most cases, yes, in rock work.

Q. Now, we're talking about earth.

A. In dirt work they use both.

Q. They pay to neat lines, don't they?

A. No, because you don't have a neat line all the way through.

Q. What is the function of the neat line in computations?

Mr. Olson: I don't see the materiality to go into a long dissertation of how they paid and figured excavations for payment on highway work. [1050]

Mr. Holman: I'm asking as to general engineering now, the function of the neat line in his experience.

The Court: Well, I'll overrule the objection. I don't see where it is leading.

Cross-Examination

(Continued)

By Mr. Holman:

Q. What is the purpose of the neat line?

A. The neat line is to a certain line that they're excavating to, or pouring to, or constructing to.

Q. Isn't it a fact the neat line is the limit of the pay quantity there, sir?

A. Not in all cases.

Q. Isn't it a fact in reclamation work, sir?

A. As far as I know, in reclamation work.

Q. Yes, sir. Now, you told counsel when you first came to this job that you got down in a hole

(Testimony of Allyn R. Hunter.)

with Mr. Waltie and measured the approximate yardage in the hole, the distance out, the length, that it was not long enough and not wide enough for structures; do you remember that?

A. Yes, sir.

Q. Isn't it a fact that the hole that you got down in was a hoe excavation only, before it had been hand graded?

A. Yes, sir.

Q. Yes, sir. In other words, you didn't get down in a hole in which the excavation had been completed, including the fine grading? [1051]

A. No, sir.

Q. All right, sir. Where was that hole? Here are the layouts. Can you tell me that hole?

A. No, sir.

Q. Why can't you, sir?

A. We looked over several of them, and I wouldn't attempt to tell you where the hole was, or the number of it.

Q. What lateral was it on?

A. I couldn't tell you the lateral it was on.

Q. What distance was it from the shop?

A. Maybe two or three miles, maybe four miles.

Q. And did you stay on the same lateral when you walked the half mile you spoke of?

A. No, we were on two different ditch lines.

Q. Is there any structure layout in this Exhibit 12 that you can identify now to the Court as one that you inspected?

A. No, I can't.

Q. Did you make any notes of the structure with respect to the layout?

A. No, we——

(Testimony of Allyn R. Hunter.)

Q. Never mind "we". You, sir. A. No.

Q. Did you keep any diary, sir, of that?

A. Pertaining to that structure?

Q. Yes, sir. [1052] A. No, sir.

The Court: Well, we'll take a recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. In this hole in which you say you got down with Mr. Waltie and measured the approximate yardage in the hole, the distance out, the length of it, it was not long enough and not wide enough for the structure, did you consult the layout of structures at the time? A. We did.

Q. Can you tell me—yes, again you say we; I'm talking about you, sir. A. I did.

Q. You, sir? A. Yes.

Q. And can you tell me what structure?

A. I can't at this time, no.

Q. Can you tell me how deep that excavation was? A. Just only by memory.

Q. Have you a memory on it, sir?

A. I would say it was around four foot deep.

Q. And can you tell me how wide it was? [1053]

A. Oh, probably in the neighborhood of four to five foot wide, maybe six.

(Testimony of Allyn R. Hunter.)

Q. And can you tell me how long it was?

A. Probably ten, eight to ten feet long. Those are estimated figures, because I don't remember.

Q. That's memory, without any notation, sir?

A. Yes, sir.

Q. And neither you nor Mr. Waltie made notations at the time?

A. Mr. Waltie was just trying to show me——

Q. Pardon me; will you answer my question, please? A. No, we didn't.

Q. All right, sir. Did you take a notation of the structures you looked at in the field——

A. No, sir.

Q. ——with Mr. Waltie on that day?

A. No, sir.

Q. And I believe you said you couldn't tell me even which lateral it was on? A. I could not.

Q. Isn't it a fact that you had one meeting with Macri only, you? A. Yes.

Q. And that's the one that you detailed in your direct examination? [1054] A. Yes, sir.

Q. Before and after lunch? A. Yes, sir.

Q. With whom did you take luncheon, Mr. Hunter? A. Mr. Hendershott.

Q. That's the auditor of Schaefer. Who else?

A. Mr. William Schaefer and Mr. Darcy.

Q. Mr. Darcy, yes, sir. Now, I'll ask you whether or not during the luncheon time your memory was refreshed with respect to additional conversation with Macri? A. No, sir, it was not.

(Testimony of Allyn R. Hunter.)

Q. And that's while you were still on the stand that you had luncheon with these gentlemen?

A. Yes, sir.

Q. Did you have any conversation with Mr. Macri, yourself, alone on that day?

A. Yes, sir.

Q. What was the nature of that?

A. Oh, I talked to him in regard to trying to expedite the work.

Q. Yes, sir. I'll ask you if this is not what you said, sir: —

Mr. Olson: I suggest he let the witness answer the question, your Honor. He asked what was said, and the witness started—— [1055]

Q. Weren't you through with the answer?

A. I was not.

Q. I beg your pardon, sir.

A. I talked to him with regard to expediting the work, explained to him how the forms were drying out, and I think I mentioned that he and Mr. Schaefer were both up on their ear to a certain extent, and that if they would get together and try to get to going that the thing would move faster.

Q. And didn't you make this statement, in substance, that it is usual for a subcontractor to complain? A. To Mr. Macri, do you mean?

Q. Yes. A. Not to my knoweldge.

Q. And didn't you make this statement, in substance, to Mr. Macri, that "I don't understand why Schaefer doesn't go ahead with this job, instead of hollering about it"? A. I certainly did not.

(Testimony of Allyn R. Hunter.)

Q. I am fixing the time, sir, and fixing the place, while you and Macri were walking back from that job, did you have any such conversation, sir?

A. No, sir.

Q. Where do you say that Mr. Macri made that statement "I'll take care of any costs in regard to fine grading, additional expenses on forms, and additional expenses to [1056] you; no man has lost any money on Macri's job, and you are no expectation"; where did he make that statement?

A. He made that statement to Mr. Cohen, Mr. Schaefer, Fred Waltie, and myself.

Q. Where? A. Out on the job.

Q. Where on the job?

A. Out where we looked over these laterals, and——

Q. You mean excavations?

A. Excavations on the laterals.

Q. And on that same day? A. Yes, sir.

Q. Now, that's the statement you made after lunch that you didn't think of this morning, is it not?

Mr. Olson: That's argumentative, your Honor.

A. That's a question that was asked me after lunch.

Q. Yes, sir, and you didn't answer as to that in the morning; you didn't recall that in the morning, did you?

Mr. Olson: That's objected to, your Honor. The witness's testimony will speak for itself in the record.

The Court: Sustain the objection.

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. I'm asking you if you didn't state this in substance, just before luncheon: "I cannot recall any discussion as to speed". Did you state that, Mr. Hunter? [1057]

A. Not to my knowledge at the present time. If I did, it's in the answers.

Q. I'm asking you if this isn't the substance of just before lunch, now, just before, while you were on this conversation about Macri; question by Mr. Olson on direct examination "Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15?" Answer "I think so. There was some discussion as to lumber, and there was a lot of discussion in Mr. Schaefer's behalf on account of the forms drying out, which they were, badly dried out". Now, wasn't that your statement?

A. That was the statement at that time, yes.

Q. Yes, sir, that you made in here just before luncheon. Now, how do you account for the fact that you didn't make this statement that you made after luncheon?

A. Because Mr. Olson asked me.

Q. But when Mr. Olson asked you "Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15", the answer you gave is

(Testimony of Allyn R. Hunter.)

the answer. What is your accounting for the fact that you didn't think of something as important as covering the whole compensation basis? [1058]

A. I have no accounting for it.

Q. Sir? A. I have no accounting for it.

Q. You have no accounting for it? All right, sir. You said that while you were there at that time, sir, in substance, according to my notes, that there was practically no lumber that was capable of being used for forms, correct?

A. That's correct.

Q. Now, were you speaking about the job yard at that time? A. That's right.

Q. Were there forms built at that time, there?

A. Yes, sir.

Q. And there was no lumber except in odds and ends, that were not capable of being used for forms?

A. There might have been a few boards.

Q. What kind.

A. I didn't look at the lumber.

Q. Wet or dry? A. I couldn't tell you.

Q. Knotty, or good?

A. I couldn't tell you that?

Q. Planed or rough?

A. I couldn't tell you that.

Q. Two by fours, or shiplap?

A. I don't think that there was much of any lumber there. [1059] There was some odds and ends and scraps, but I didn't pay any attention to—there was no four or five thousand feet there when I was there.

(Testimony of Allyn R. Hunter.)

Q. Now, it is a fact, is it not, that you and Mr. Schaefer and Mr. Waltie came up in your car from Portland?

A. Yes, sir.

Q. To meet Mr. Macri on the job?

A. Yes, sir.

Q. And on that trip you had definitely decided what you were going to talk to Macri about?

A. No, sir.

Q. Sir? A. No, sir.

Q. What was the purpose of the meeting?

A. Mr. Schaefer asked me to come up with him.

Q. Why?

A. To look over and see what I thought about the job.

Q. Why?

Mr. Olson: Your Honor please, that's not a proper question, unless counsel will change his question. My objection is asking Mr. Hunter why Mr. Schaefer did certain things. Obviously he wouldn't know.

Q. That isn't what I mean. What did Mr. Schaefer tell you he wanted you to come for, you, a bond man?

A. He wanted me to look over the job. [1060]

Q. Why?

A. He said he wasn't satisfied with the excavations and the way Macri was running the job.

Q. And you came up there as a cohort and a witness of Schaefer's at that time, did you not?

Mr. Olson: Your Honor please——

(Testimony of Allyn R. Hunter.)

Q. Strike that question. You drove the party here in your car, Mr. Hunter? A. Yes, sir.

Q. Is that your car or the agency's car?

A. That is my car.

Q. Your personal car, yes, sir. And on the way up did you discuss this job?

A. Not to my knowledge.

Q. All right, sir. Did you have any of the layout structure with you?

A. Mr. Fred Waltie had some when we got up there. Whether he got them out of the office or whether he had them with him——

Q. Pardon me; Waltie didn't come up with you?

A. He did come up with us.

Q. He had them when you were on the job?

A. Yes, sir.

Q. Had you had any preliminary conference before you came on that inspection trip, sir? [1061]

A. Not that I remember of, except Mr. Schaefer called me up on the telephone and wanted to know if I could come on the job with him.

Q. Isn't it a fact, Mr. Hunter, that you arranged for this appointment? A. I certainly did not.

Q. Who arranged for it, do you know?

A. Evidently Mr. Schaefer.

Q. You were not present when it was arranged for? A. I was not present.

Q. And isn't it a fact you came up for the purpose of determining how Mr. Schaefer could avoid his sub-contract obligations? A. I did not.

(Testimony of Allyn R. Hunter.)

Q. And isn't it a fact that you knew that there would be yourself, Mr. Schaefer and Mr. Waltie there against Mr. Macri alone? A. I did not.

Q. And you made no memo at all as to lumber?

A. No, sir.

Q. Did you discuss that pile of lumber with Mr. Macri there at the yard?

A. Not to my knowledge.

Q. You, I'm talking about, sir.

A. Not to my knowledge. [1062]

Q. Now, I believe you told counsel that you came back again next time on August 20, 1944?

A. Somewhere in that neighborhood.

Q. That time you came with a Mr. Ratutan, of the City Electric Company, from Pasco up on to this job and then went back to Portland?

A. Yes, sir.

Q. No Mr. Schaefer there at that time?

A. No, sir.

Q. No Mr. Darcy?

A. No, sir, there was none of the men; it was after working hours.

Q. None of the men there at all?

A. I think there was one man there.

Mr. Olson: I didn't get your answer.

A. I think there was one man on the job there, as I remember it.

Q. I think you said there was one man, but at that time that was not a pre-arranged meeting, was it?

A. No, sir; I was up in Pasco on business and drove back that way.

(Testimony of Allyn R. Hunter.)

Q. Now, why did you go to this job at that time? A. Why?

Q. Yes, what was your interest?

A. I think very seldom, after you've spend so much time in [1063] the engineering and constructing business, that if you have been over a job once, you very seldom hesitate, if you don't have to go out of your way, to go over them again.

Q. You drove from Pasco up, didn't you?

A. It was just as easy to go up this side as it was the other.

Q. And you didn't go over the job at all?

A. It was too late in the evening.

Q. But you did go to the yard at that time?

A. That's where the office was.

Q. Isn't it a fact you only went to the yard, between 6 and 7 in the evening, and you didn't make any inspection at all? A. No, sir.

Q. Wasn't that a fact?

A. I didn't make any inspection.

Q. But you did remember at that time, did you not, that at that time there was some Sealtite there?

A. No, sir.

Q. And one thousand or two thousand feet of lumber there in the yard?

A. I estimated there was about one thousand or two thousand feet of lumber.

Q. Did you say something about some Sealtite there? [1064] A. I did not.

Q. Did you say there was some steel ties?

A. I said that there was some steel tied there, re-inforcing steel.

(Testimony of Allyn R. Hunter.)

Q. That was for concrete?

A. Re-inforcing concrete steel.

Q. Yes, sir; and your reason for not going out was that it was too dusty?

A. It was dusty, it was late, and I didn't have anybody to take me out on the job.

Q. Didn't you answer counsel you made no examination of excavations, it was too dusty; isn't that what you said, sir?

A. Yes, sir.

Q. Was there considerable dust out there at that time?

A. Yes, sir.

Q. That would have been a good time to inspect the excavations, would it not, sir?

A. That's right.

Q. But you didn't do it?

A. Didn't have anybody to take me out on the project.

Q. You had your own car?

A. You don't go out on one of those projects without your having somebody go out and show you where they are.

Q. Didn't you know where they were? [1065]

A. Not exactly, no; they cover too much territory.

Q. Then you went on the job the latter part of September or first part of October, correct?

A. Yes, sir.

Q. Your comment then "there was no work going on"?

A. That's right.

Q. No men?

A. No, sir.

(Testimony of Allyn R. Hunter.)

Q. What did you do by way of inspection at that time, sir? A. Nothing.

Q. When you said there was no work going on, or no men, do you mean Schaefer men or Macri men?

A. There was none around the job office; that's as far as I went.

Q. Oh, there was no work going on around the job office? A. No, sir; nobody there.

Q. And you didn't go out in the field at that time? A. No, sir.

Q. And you don't know whether there were any men out in the field or not, do you?

A. I couldn't say.

Q. Mr. Hunter, as an engineer, would you kindly tell me, with due respect to Exhibit 12, which you hold, the approximate weight of the form for a single concrete structure? Take one there; take any batch, any single one, here's [1066] one.

A. Just a minute, I'll have to get my cheaters on here.

Mr. Olson: The approximate weight?

Q. I haven't finished my question yet. All right, referring to structure 10, in lateral 59.3, in Exhibit 12. Can you tell me the approximate weight of that form before it receives the concrete?

A. Of the form itself?

Q. Yes, sir.

Mr. Olson: It's not clear to me. You're asking about forms for a complete structure, or one panel.

(Testimony of Allyn R. Hunter.)

Mr. Holman: I'm just asking for that one, 10, it is a small square one. It's the simplest one I can get.

The Court: What was that section?

Mr. Holman: It is in lateral 59.3, your Honor, the second page of Exhibit 12.

A. Do you mean as dry lumber, wet lumber?

Q. Let's take it dry lumber, and then let's take it wet lumber.

A. Well, there would be about 21 per cent difference in the thing, and I would say off-hand that it weighed somewhere in the neighborhood of 265 to 300 pounds.

Q. 265 to 300 pounds. Now, can you also compute the approximate cubic yardage of concrete that structure number 10 would accommodate?

A. Yes.

Mr. Olson: Your Honor, I fail to see the materiality of this.

The Court: I don't either.

Mr. Olson: How much it weighs with concrete in it; I object to the question on the ground it is wholly immaterial.

Mr. Holman: Well, I'll connect it up, your Honor.

Mr. Olson: How can you possibly connect it up?

Mr. Holman: Well, I'll connect it up on my cross-examination of this witness with respect to his inspection in the field, sir.

(Testimony of Allyn R. Hunter.)

The Court: Well, I'll overrule the objection, but I don't see where it is material, or where it could be material.

A. Do you want this right on the button?

Q. Not right on the button. I want it approximately. You mean by "on the button", exact, do you?

A. Right down to the last hundredth?

Q. No, sir, I do not.

A. Oh, in round figures, it is about 1.57 yards.

The Court: What?

A. 1.57.

Q. And what does a cubic yard of concrete weigh, about, in place? [1068]

A. Well, I can't tell you what your sand content is, out here, or your gravel content.

Q. What would be an average for this job?

A. Average including water?

Q. Yes, in place.

A. Oh, about 4000, close to 4000 pounds, I'd say, average.

Q. Yes, then you said the structure weighed about 300, 250?

A. Yes, somewhere around there; 300.

Q. So that there would be on that structure 10 approximately a 4300 to 4500 pound weight exerted on the earth?

A. Yes, sir.

Q. Now, is it engineering practice to allow for that in fine grading, or not?

A. No, they don't allow for it.

Q. All right, sir. You're sure of that, sir?

(Testimony of Allyn R. Hunter.)

A. There may be some cases where they do, but as a rule, why, they fine grade the stuff right to the hubs, and your compression per cubic inch or square inch takes care of it.

Q. There is no compacting, is there, after the fine grading?

A. I think the Bureau of Reclamation insists on compacting beforehand, don't they?

Q. I say, there is no compacting after fine grading? A. No.

Q. Then you say there is no give for 4500 pounds exerted [1069] within an area such as that structure 10? A. Very little.

Q. All right, sir. Did you determine the weight of any structure, filled, while you made that inspection? A. No, sir.

Q. In your cost of \$26.00 per cubic yard which you gave counsel as the fair and reasonable cost or value under his one hypothetical question, did you include or exclude the cement?

A. Excluded the cement.

Q. And all of the ingredients going into the cement? A. Sand and gravel.

Q. And did you include or exclude transportation? A. Included the whole——

Q. And did you include or exclude demurrage on cars? A. On cars?

Q. Yes, sir. A. Nothing.

Q. You contemplated there would be no demurrage on cars, did you?

A. Couldn't see where there would be.

(Testimony of Allyn R. Hunter.)

Q. And did you include or exclude all items covered by the sub-contract? A. All what?

Q. Items covered by the sub-contract. [1070]

A. All items covered—

Q. Let's put it this way, specified in the sub-contract. A. Specified—included.

Q. Included that, yes, sir. In advance of your inspection in the field had you consulted the books and records of the Schaefer Company?

A. No, sir.

Q. Or any account of any expenditures made by the Schaefer Company? A. No, sir.

Q. Did you at any time prior to that inspection see any account of cost by Schaefer and Company?

A. On that particular job?

Q. Yes. A. No, sir.

Q. And did you in advance of your visit to the job in August—pardon me, in September—August, I should say, August 20, had you consulted their costs? A. No, sir.

Q. Or in advance of your September, late September or first of October visit?

A. No, sir, I have never consulted their costs.

Q. In advance of your taking the stand, Mr. Hunter, have you gone over their costs with them?

A. I have never consulted their costs. [1071]

Q. Then the answer is you have not looked at them at all? A. No, sir.

Q. Can you tell me, please, approximately how much lumber is required per cubic yard of structure, average, for forms?

A. On specific structures?

(Testimony of Allyn R. Hunter.)

Q. No, average; could you tell me that as an engineer? A. Per cubic yard?

Q. Yes, could you do that as an engineer, sir?

Mr. Olson: Your Honor, I think that is immaterial. I suppose he could take these 575 structures and figure them out and divide by 575.

Mr. Holman: I'll withdraw the question in view of counsel's statement, your Honor. I just can't be interrupted in cross-examination.

The Court: Well, counsel has a right to make an objection to your questions, of course, regardless of whether it constitutes an interruption.

Q. How much lumber will it take for an average structure on this 1062?

Mr. Olson: Your Honor please, I object to that as an impossible question to answer. If he wants to refer to any structure, and asks him how much lumber it would take for that structure, I think that is proper, but an average structure, I think it is an impossible question.

The Court: Find out if he can make an estimate, [1072] as an engineer.

Q. I'd like him to say if he can.

A. Yes, I can make an estimate of how much lumber it takes.

Q. Now, did you do that in advance of preparing the bid for Mr. Schaefer, working with him in the preparation of the bid? A. No, sir.

Q. You did not take the cost of lumber into consideration? A. No, sir.

(Testimony of Allyn R. Hunter.)

Q. Did you suggest to Mr. Schaefer that lumber be made a Macri item? A. I did not.

Q. Or any of Mr. Schaefer's men?

A. No, sir.

Q. I understood you to say on direct examination that you happened to go to Mr. Schaefer's office, that he happened to be working on his bid, and you worked with him.

A. I didn't work with him. I roughed out an estimate for my own benefit.

Q. Do you have that estimate with you?

Mr. Olson: I'd like to have the witness finish the last question.

Mr. Holman: Finish the last answer.

Witness: Let's have the question again, please.

(Whereupon, the reporter read the last previous [1073] question and answer.)

Witness: Mr. Schaefer had already had his estimate worked up.

Q. Then you say that you worked an estimate independently of Mr. Schaefer, or you copied his, which?

A. I worked an estimate independently.

Q. Do you have that with you?

A. No, sir.

Q. Can you get that, sir?

A. I have an idea it is in the waste-basket someplace.

Q. What is the rule to determine the lumber required for a structure?

(Testimony of Allyn R. Hunter.)

A. For a structure?

Q. Yes. A. The square footage.

Q. The square footage of the walls?

A. Uh huh.

Q. And the base? A. Uh huh.

Mr. Holman: All right, sir. I have no more questions.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Hunter, you wrote the bond in this case, did you, or Mr. Rogers did?

A. Mr. Rogers; I wasn't in the office much.

Q. And when did you acquire the Rogers Company? A. November 1, 1945.

Q. After this job was completed, I take it, then?

A. Yes, that would be right.

Q. Did you have any interest in that company at the time this job was under way?

A. I was an associate partner.

Q. You were an associate partner?

A. Yes.

Q. So you had a financial interest?

A. I had a financial interest.

Q. You had an interest in the profits of the concern, I take it? A. That's right.

Q. You are general agent for the Glen Falls Indemnity Company? A. Yes, sir.

Q. When you went out on the job June 15, 1944, you were representing the Glen Falls Bonding Company? A. I was not.

(Testimony of Allyn R. Hunter.)

Q. You were not? A. I was not.

Q. Did you make a report to the Glen Falls Bonding Company after you returned to your office?

A. Not at that time, no, sir.

Q. Not at that time; at any subsequent time did you? [1075]

A. I wrote a letter——

Mr. Olson: If your Honor please, I don't think any report this man made—I don't see why they're trying to bring in the Glen Falls Bonding Company. They said they're going to connect it up to show his interest, and as yet they haven't even remotely done so, and I object to any examination on it. It is immaterial.

The Court: I don't quite see the materiality of it.

Mr. Hawkins: If this man made a report to the bonding company directly after this trip, it would tend to show he made the trip on behalf of the bonding company and therefore had an interest in mind, at least, when he went out there.

The Court: Well, I'll overrule the objection. I don't think there is any question but what he represented the bonding company throughout the whole transaction.

Mr. Hawkins: Well, I gathered from what he said that he denied he was representing the bonding company.

The Court: I'll overrule the objection.

Witness: I did not make out any, or did not write any letter in regard to this job for probably

(Testimony of Allyn R. Hunter.)

six or seven or eight months afterwards, and it was in generalities then, to the bonding company, and neither did I represent the bonding company in any way, shape or form on this job, [1076] except I got the commission off of the bond.

Q. Now, when you went out with Mr. Schaefer you went as a friend, I take it? A. Yes, sir.

Q. Who paid for your time while you were out there?

A. I think I took care of my own time.

Q. I didn't understand your answer.

A. I think I paid for my own time.

Q. How do you mean?

A. Why, I bought the gasoline and oil, and probably bought my own meals; maybe Mr. Schaefer did.

Q. You were paid no salary by anyone?

A. No, sir.

Q. Did Mr. Schaefer ever pay for your time out there on that job? A. No, sir.

Q. Did you go out there as his consulting engineer? A. No, sir.

Q. Then when you went out there you were not compensated by Mr. Schaefer or the bonding company in any way, shape or form?

A. I was not.

Q. Except as you received a commission from the bonding company for the sale of the bond?

A. That's right. [1077]

Q. You testified that \$26.00 or \$27.00 per cubic yard is the fair price or value of concrete poured out there, is that right? A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. Did you know that Mr. Macri contracted to pour that concrete for \$35.00 a yard?

A. I did.

Q. How did you arrive at \$26.00 a yard as being the fair value?

A. Equipment rentals, labor——

Q. Equipment rentals; was there any equipment rented on this job?

A. Practically all contractors charge a rental.

Mr. Hawkins: Now, I object to that and move that that answer be stricken as not responsive.

A. I don't know whether there was equipment rentals on the job or not. In making up my bid I would have to figure equipment rentals.

Q. And what equipment did you have in mind, sir?

A. A mixomobile.

Q. And what else?

A. And from two to four trucks.

Q. And what else?

A. One of those would be used as a water wagon, and incidental tools. [1078]

Q. Any other equipment?

A. Not at that time.

Q. Did you figure on a buggymobile?

A. No.

Q. What about labor costs? What was the scale of a carpenter at that time?

A. Oh, let's see, I think the scale of a carpenter at that time was somewhere around \$1.47½, something like that.

(Testimony of Allyn R. Hunter.)

Q. You don't remember?

A. Not exactly.

Q. And what was the scale paid a concrete operator?

A. A concrete operator on a Mixomobile, I think it is \$1.75.

Q. At that time?

A. Yes, somewhere around there.

Q. You don't remember?

A. No; we had work going ourselves, and followed the scale explicitly at that time.

Q. And who is "we"? You mean the bonding company?

A. No, C. H. Wheeler Construction.

Q. Were you associated with Mr Schaefer in any way as a partner on this job? A. No, sir.

Q. Did you have any financial interest on it at all? A. No, sir.

Q. You were pretty busy in those days, weren't you, sir? [1079]

A. Very busy.

Q. Working for the Wheeler Company?

A. Yes, sir.

Q. Have you since become a partner of Mr. Schaefer's? A. No, sir.

Q. Or financially interested in any of his jobs?

A. No, sir.

Q. Do you know whether or not the Glen Falls Bonding Company financed the completion of Mr. Schaefer's contract?

A. I know definitely that the Glen Falls did not furnish any money on this contract.

(Testimony of Allyn R. Hunter.)

Q. On this contract?

A. Or any other contract of Mr. Schaefer.

Q. You testified on direct examination that if Mr. Macri had performed his work according to his contract, that Mr. Schaefer would have been able to complete his work in 70 or 75 working days, is that right? A. Yes, sir.

Q. Now, what sort of crew did you have in mind when you so testified?

A. I would say around, somewhere between 17 to 25 men, owing to what the conditions were.

Q. 17 to 25 men. Now, you know as a matter of fact that Mr. Darcy was never able to get that many men on the job at any time, don't you? [1080]

A. I do not know.

Q. Well, if, as a matter of fact, Mr. Darcy were only able to get on the job from 6 to 10 men, and a maximum of 12 at any time, would that change your estimate as to the number of days that he could have completed that contract in?

A. To a certain degree, without additional equipment put on to take care of the men.

Q. It would have taken twice as long, would it not? A. No, not twice as long.

Q. It would not have taken twice as long?

A. No.

Q. No, then, you say more equipment to take care of the additional men, I think you testified a moment ago you contemplated one Mixomobile and four trucks on the job?

A. I did at that time.

(Testimony of Allyn R. Hunter.)

Q. Yes; now, if you have one Mixomobile and two to four trucks on the job, and the men on the job were busy all the time, do you contend he could have done the job in less time if he had 25 men on the job?

Mr. Olson: I object to the question as being complex. It is argumentative, contains elements not involved in this case; the evidence is the equipment was not busy all the time, that they worked from one to three days a week and would be off for five days; that's all [1081] the testimony.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, my point here is simply this, that this witness has said it would take 70 to 75 days to complete this job if Macri had performed according to contract. Now we find out that his estimate is based on the assumption that there would be 20 to 25 men on the job all the time, and these records, while they haven't been admitted in evidence, are here. They show that at no time did Schaefer and Company have any more than 12 men on the job at any one time, and I submit that this witness's testimony of 70 to 75 days is not based on the facts of this case at all.

The Court: Did he say he assumed there would be 25 men on the job?

Mr. Hawkins: 20 to 25, is that not right, sir?

Witness: 17 to 25.

Mr. Olson: Your Honor, that is the very point we're making. Counsel ought to be over here. That

(Testimony of Allyn R. Hunter.)

is our contention, that they didn't have the holes through to put on that big a crew.

The Court: Well, let's start over again.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, then, Mr. Hunter, if in fact, instead of 17 to 25 men, you had on the job only 6 to 12 men, would it not [1082] have taken twice as long as your 70 days to complete this job?

A. Not in proportion to your figures, no, if you strike a figure of 6 to 12——

Q. First, would it have taken longer?

A. It would have taken longer.

Q. Yes. All right, how much longer?

A. It is owing to what proportion of men. If you're going to use 6 men, that's one thing; if you're going to use 12 men, that's a different thing.

Q. Well, you used 25 in your estimate, didn't you?

A. No, I said from 17 to 25.

Q. Well, 25 is one of the figures you mentioned.

A. All right, we'll take 17 men.

Q. No, let's take 25 men. You're the one that mentioned that figure, as opposed to 10. How much longer would it take 10 men to do the job than 25?

A. Oh, you wouldn't go quite twice as much.

O. Not quite twice as much?

A. No, because your equipment there, if it is rolling, if you've got enough men for your equipment rolling, and you put your forms in——

(Testimony of Allyn R. Hunter.)

Q. In other words——

Mr. Olson: Let him finish.

A. ——if you can take that concrete mixer and keep going——[1083]

Mr. Hawkins: Well, he's not answering any question I asked.

The Court: Let's not argue. Address your remarks to the Court.

Mr. Hawkins: I would like to ask another question.

The Court: All right, if you will wait until the witness answers the question. Did you finish your answer?

Witness: Well, no. If you take a certain crew of men and double that crew, you're not going to expedite it 100 per cent, or if you cut off half of that crew you might not drop the efficiency of the crew 100 per cent, or 50 per cent. It is owing to whether your equipment is moving all the time and you have forms for your concrete to go into.

Mr. Hawkins: I wonder if the reporter would read my last question, please?

(Whereupon, the reporter read the last previous question [the question commencing at line 15, page 430 of this transcript].)

Mr. Hawkins: I submit that answer is not responsive to my question.

The Court: Well, go ahead and ask another question.

(Testimony of Allyn R. Hunter.)

Mr. Hawkins: I take it your Honor is denying my motion to strike that as not being responsive.

The Court: Yes, it is denied.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, you testified that it cost or would cost two or three times the actual cost—strike that—you testified that Mr. Schaefer's actual costs were two or three times what they would have been had Mr. Macri properly performed his contract, is that right?

Mr. Olson: Your Honor, that's not correct. He didn't state what Mr. Schaefer's costs were, nor did I ask him. I asked him what the costs would be.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: I'll overrule the objection. He can tell what he said.

Witness: I'm sure that I didn't testify as to Mr. Schaefer's costs.

Q. Well, Mr. Hunter, did you not testify on direct examination that Mr. Schaefer's costs were two or three times, actually, what they would have been had Mr. Macri performed his contract? I realize you do not know and did not testify as to what Mr. Schaefer's costs were, but you did testify

(Testimony of Allyn R. Hunter.)

that they were two or three times what they would have been had Mr. Macri performed his contract?

A. That's what I think.

Q. Isn't that what you testified on direct examination?

A. I testified that the costs would run approximately two or three times additional on the time element alone.

Q. Now, that testimony was based upon your going out in the field and being out there for a period of about four hours, is that right?

A. Not necessarily, no.

Q. Now, I'm asking whether it is necessary or not.

A. No, it wasn't based upon that.

Q. It was not based upon what you saw out there in the field at all?

A. It was based partially on what I saw in the field.

Q. And you saw only 7 or 8 structures, or 6 or 8 structures, when you were out in the field?

A. Yes.

Q. Out of a total of some 500 structures?

A. That's all that were in.

Mr. Hawkins: Your Honor, at this time I move that this witness's answer to those hypothetical questions be stricken because he now admits his answer was based partly upon what he saw in the field, and not strictly upon the elements counsel enumerated in his hypothetical question.

The Court: Denied. [1086]

(Testimony of Allyn R. Hunter.)

Mr. Hawkins: Well, your Honor, this witness has just now stated that his answer to that question——

The Court: Was partly based upon his looking at the structures in the field.

Mr. Hawkins: Your Honor, as I understand it, in answering that question he was directed to certain elements that counsel enumerated in his hypothetical question.

The Court: Well, it goes to the weight of the testimony, not the admissibility. I'll deny the motion to strike.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. What did you base that testimony on, sir?

A. What I saw in the field;

Q. What else?

A. On the man hours that was told to me.

Q. By whom?

A. By Mr. Schaefer and Mr. Hendershott.

Q. As to what? A. What——

Q. As to what? Number of man hours?

A. Number of man hours that was worked on the job.

Q. What else?

A. And common ordinary common sense construction practice.

Q. Was it based at all upon your experience as an engineer? A. It was. [1087]

(Testimony of Allyn R. Hunter.)

Q. It was based upon your experience as an engineer, upon common everyday horse sense, upon what Mr. Schaefer told you was the number of man hours spent, and upon your experience in the field, is that right? A. Yes, sir.

Q. Anything else?

A. I don't remember offhand just now.

Mr. Hawkins: Your Honor, I renew my motion. The witness's answer to those hypothetical questions is based now partly upon what Mr. Schaefer told him.

The Court: Motion denied.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, how much does concrete weigh per cubic yard? A. It varies.

Q. From what to what?

A. Oh, it could weigh—it is owing to what your aggregates weigh, how much water you're using.

Q. Did you see any of the aggregates used in the field? A. Yes.

Q. Assuming that that is the aggregate that I'm asking about.

A. You cannot judge aggregates by looking at them.

Q. I see. Then you have no idea as to what the concrete would weigh, wet, poured into the form?

A. In round figures, yes.

(Testimony of Allyn R. Hunter.)

Q. What is that? [1088]

A. Somewhere around two ton.

Q. Around two tons per cubic yard; do you have any idea as to the lateral pressure exerted by that wet concrete?

A. Oh, I couldn't give you the square inch pressure.

Q. You could not? A. No.

Q. Do you have any idea as to what the vertical pressure of that concrete, wet, poured into the forms? A. No.

Q. Per square inch? A. No.

Q. Do you have any idea as to the type of foundation soil there must be to sustain that kind of weight?

A. That is problematical, and a technical question as far as compaction is concerned, and type of soil.

Q. You qualified yourself as an engineer here, sir. A. Yes, sir.

Q. And a man of much experience in concrete work, isn't that right? A. Yes, sir.

Q. And you do not know the vertical pressure exerted by wet concrete? A. I do not.

Mr. Olson: If your Honor please, to this line of questioning I wish to place this objection, that the [1089] testimony shows by the Bureau of Reclamation engineer called by the defendants that these structures were all tested and checked by the Bureau of Reclamation field inspectors for grade, and OK'd for the pouring of concrete. Our testi-

(Testimony of Allyn R. Hunter.)

mony is to the excavation work in order to put in the structure forms to that grade, and the question of lateral pressure or allowance for being higher or not is certainly immaterial, because every one of these forms was checked by the Bureau of Reclamation and approved by them, and had to be, before we could pour concrete.

The Court: I assume what they're trying to show is that it is all right to leave them high because the concrete would press them down to grade. I'll overrule the objection.

Mr. Hawkins: My purpose is directed to this witness's qualifications, your Honor. Here is an engineer who has had years of experience in pouring concrete for years and years and years, 17, if I'm not incorrect, and he doesn't know the lateral or the vertical pressure exerted by concrete. I submit that goes to this man's qualifications, and that his testimony becomes entirely weightless if he doesn't know a simple matter of that kind.

The Court: I don't think engineers know everything, any more than lawyers do. I'll overrule the [1090] objection.

Witness: I doubt if there is any man in the Bureau of Reclamation, without they're really working with that, that can tell you that.

Mr. Hawkins: Just a moment. I move that be stricken as not responsive.

The Court: It will be stricken.

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, have you examined Exhibits 23, 24, 25 and 26? A. Yes, sir.

Q. In reference to Exhibit 23, that is the ideal excavation, is it not? That's a perfect excavation?

A. I wouldn't say that.

The Court: You'll have to speak up so that we can hear.

A. It is very good.

Q. That is a very good excavation? And it would form a proper basis for pouring concrete?

A. I should think so, yes.

Q. Well, you've examined it. Don't say whether you think so or not. A. I do; it is.

Mr. Holman: Pardon me, I didn't get the answer.

A. I said it is, and I do.

Mr. Hawkins: I wonder if the reporter would mark [1091] a particular bank here for us?

The Court: Do you want the clerk to mark it for you? The reporter can't write and mark at the same time.

Mr. Hawkins: The clerk. Mr. Clerk, would you please mark that bank right there?

(Whereupon, a portion of Exhibit 23 was marked Exhibit 23a)

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, with reference to bank 23a, Mr. Hunter, I'll call your attention to the fact that that is a vertical which starts at the footing and goes directly down. A. Yes, sir.

Q. And on the top of that bank there is a concrete pour? A. Yes, sir.

Q. Now, in your opinion is that a proper excavation for that concrete pour?

A. It is owing to whether it is to be performed or not——

Q. Just a moment. Can you answer that question yes or no, sir?

A. No, I can't answer it yes or no.

Q. You cannot answer it yes or no. Now, is it not a fact that this wet concrete pressing down on that vertical excavation would cause it to crumble and fall?

A. Before I answer that may I ask a question?

Q. No, you may not, sir. Can you answer my question? [1092]

A. Let me see the form just a minute.

Q. Can you answer my question, sir?

A. Yes.

Q. What is your answer?

A. It would not cave in on the form, with a form in there.

(Testimony of Allyn R. Hunter.)

Q. Beg pardon?

A. It would not cave in with a form in there. Do you mean they're going to lay the slab first, before they put the forms in?

Q. Just a moment, Mr. Hunter. With reference to plaintiff's Exhibit 23 and plaintiff's Exhibit 24, if you have the concrete forms built according to Exhibit 24, and then pour your concrete into it, this wet, heavy concrete, will it not as a matter of fact break down bank 23a?

A. Yes, probably on that corner.

Q. Yes. In other words, plaintiff's Exhibit 23 is not a proper excavation for that structure, is that not right, sir?

A. I think the excavation is all right.

Q. Even though the bank would break down when the concrete was poured?

A. It would require a form in there to hold that bank.

Q. Yes, and there is no form there, is there, sir?

A. No.

Q. Having in mind that structure, it is not a proper excavation? [1093]

A. I think it is a proper excavation.

Q. Provided there is another form in there?

A. It still would have to be a proper excavation, otherwise I don't know how it would be done.

Q. Would you as an expert concrete engineer, Mr. Hunter, state that it was proper to pour wet

(Testimony of Allyn R. Hunter.)

concrete on to a foundation that consists of a vertical bank falling away below the footing of the concrete?

A. Would you state that question again?

(Whereupon, the reporter read the last previous question.)

A. No, not necessarily.

Q. Now, Mr. Hunter, on direct examination you testified that these excavations that you saw out there were not proper in order to receive the structures? A. That's right.

Q. Now, what did you have in mind when you said "proper"? A. They were too tight.

Q. You had in mind the experience that you had on other jobs? A. That's right.

Q. In other words, your testimony in that respect was based upon experience that you had had in other concrete construction jobs?

A. That's correct. [1094]

Q. And other excavations on other jobs, including this reclamation project down in Oregon, is that right, sir?

A. I didn't have that reclamation project in Oregon; I bid on four jobs down there.

Q. You bid on them? A. Yes.

Q. I see; you didn't get them? A. No.

Q. Mr. Hunter, in all of your experience in concrete work have you ever seen an excavation like Exhibit 23 in reclamation work?

A. Probably not that neat, no.

(Testimony of Allyn R. Hunter.)

Q. You consider Exhibit 23 typical of the type of excavation required by the specifications 1062?

A. To a certain extent, yes.

Q. What do you mean by "to a certain extent"?

A. Well, I think that's what they would strive for.

Q. That's something you strive for but you never can attain, isn't that the truth?

A. Well, it can be attained to——

Q. Is it ever attained in practical construction, sir?

A. Where a contractor's doing his own work, he most generally——

Q. Just a moment——

A. Is it ever attained?

Mr. Hawkins: Would you repeat that question again? [1095]

(Whereupon, the reporter read the last previous question, as follows: "Is it ever attained in practical construction, sir?".)

A. Yes, it is attained.

Q. Now, I understood your testimony a few minutes ago that you had never seen one like Exhibit 23?

Mr. Olson: No, he said, your Honor, he had never seen one that neat.

The Court: Well, proceed.

Q. Well, which is right? Exhibit 23 is typical of construction generally?

A. I didn't say it was typical; I said that you will see some of it that good, but very little.

(Testimony of Allyn R. Hunter.)

Q. Very little, yes. Now, you say you examined the specifications on this job 1062?

A. I did.

Q. And what would say the specifications called for in the way of a slope?

A. I couldn't tell you right now. I haven't examined them since 1944.

Q. I see. Well, now, you just testified that Exhibit 23 was a typical one required.

A. I've heard enough on it that I think it is one foot out and a 1 to 1 slope.

Q. One foot out from what? [1096]

A. One foot out from the outside of the form.

Q. From the outside of the form?

A. From the form out, and then on a 1 to 1 slope.

Q. And your testimony is based on that assumption? A. Yes.

Q. Well, now, I don't want to seem burdensome, Mr. Hunter. I have specifications 1062, plaintiff's Exhibit 3, this is the exhibit itself. I wonder if paragraph 47 is not the paragraph you examined when you made that determination?

A. Yes, sir.

Q. That's the paragraph on which you based your assumption that it called for a foot from the outside of the forms?

A. Outside of the footing.

Q. Well, now, just a moment. Would the reporter read the question? I'm sure Mr. Hunter said from the form.

(Testimony of Allyn R. Hunter.)

(Whereupon, the reporter read the previous questions and answers, as follows: "Question: I see. Well, now, you just testified that Exhibit 23 was a typical one required." "Answer: I've heard enough on it that I think it is one foot out and a 1 to 1 slope." "Question: One foot out from what?" "Answer: One foot out from the outside of the form." "Question: From the outside of the form?" "Answer: From the form out, and then on a 1 to 1 slope.")

Q. I think that was established pretty clearly, Mr. Hunter, that your testimony was based on a measurement of one foot from the outside of the form out, and then on a 1 to 1 slope. A. Yes.

Mr. Olson: Move that be stricken. It doesn't constitute a question, it constitutes a statement of counsel.

The Court: Overruled.

Mr. Holman: May it please the Court, the witness said "yes."

The Court: Yes, he said that was his testimony.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, is it not a fact that the dimensions as given by the specifications are one foot outside of the foundation of the structure?

A. That's right.

(Testimony of Allyn R. Hunter.)

Q. And not one foot from the outside of the form? A. That's right.

Q. And that of course is for pay quantity, is it not, sir? A. That's right.

Q. Now, do you ordinarily in determining the specifications, Mr. Hunter, take the pay quantity measurements?

A. How do you mean the question there?

Q. The question is this, Mr. Hunter: In determining what [1098] the specifications call for in the way of an excavation, do you take the pay quantity set forth in the specifications?

A. You take that as the specification to do the job by.

Q. You take that as the specification of the excavation itself, sir? A. Yes.

Q. That, however, is in fact the measurement for payment, is it not, sir?

A. The one foot out and the 1 to 1 slope?

Q. Yes. A. Yes, sir.

Mr. Hawkins: I think that's all.

Mr. Holman: May I ask an additional question?

The Court: I think hereafter, it seems to me that it is fair to let each counsel cross-examine once, and not come back again and again on the same witness before there is redirect examination; if you have another question here——

Mr. Holman: I just had in mind, Mr. Hawkins developed something on 23a that I didn't touch on in my cross-examination, your Honor.

The Court: All right, I'll permit you to ask it.

(Testimony of Allyn R. Hunter.)

Cross-Examination

By Mr. Holman:

Q. You stated, did you not, that you estimated jobs similar [1099] to the Roza Project?

A. Yes, sir.

Q. Now, have you ever in the field, as a practical construction matter, seen excavations for structures similar to 23? A. Yes, I have.

Q. On the Roza Project, sir? A. No, sir.

Q. You have not seen it on the Roza Project?

A. No, sir.

Mr. Holman: That's all, sir.

Redirect Examination

By Mr. Olson:

Q. Mr. Hunter, counsel asked you if you were out on the job June 15, I believe, if you checked any excavations that did not have forms in them, upon which the fine grading had been done, and you said "no." Do I correctly narrate your testimony? What I want to get at is, why didn't you, Mr. Hunter? A. Why didn't I?

Q. Yes.

A. I wasn't going checking anything except as Mr. Schaefer and Mr. Macri were discussing the thing there, and for my own benefit I just looked at the holes and pulled out my rule that I took out of the car with me and measured between the hubs, and satisfied my own curiosity, and [1100] then talked it over with both of them.

Q. Did you find any holes there at that time that had been fine graded or upon which fine grading

(Testimony of Allyn R. Hunter.)

had been done, that didn't have structure forms in them?

A. No, there was no holes that was fine graded at the time I was there.

Mr. Olson: That's all.

Mr. Holman: You mean there were no holes that you inspected? A. That is correct.

The Court: Any further questions?

Mr. Olson: Could Mr. Hunter be excused? He is very anxious to get back to Portland.

Mr. Holman: Your Honor, I would like to have Mr. Hunter available as a defense witness with respect to the application to the Glen Falls Indemnity Company. I don't want him to wait here, but I would like to have him subject to returning at our expense.

The Court: Where is your office?

Witness: Title and Trust Building, Portland.

The Court: Will you be there?

Witness: I certainly will.

The Court: Then you will be available for subpoena?

Mr. Holman: I can't subpoena, your Honor, over [1101] 100 miles.

Mr. Olson: Do you have in mind having him produce a record that is in his possession?

Mr. Holman: I have in mind having this witness testify as to the application, and I think I can prove he saw it.

Witness: Your Honor, if I can write for that application, I would be more than willing to get it. I can't demand the Glen Falls to give it to me.

(Testimony of Allyn R. Hunter.)

Mr. Holman: Well, I will be satisfied if you will send me a photostat of the application signed by Mr. Schaefer, sir, and certified by you that it is a correct copy.

Witness: Well, all I can do is write to the Glen Falls and request it.

Mr. Holman: No, you may telephone at my expense, sir, and I will pay that, and I will pay the air mail back. Will you do that, sir?

Witness: I will.

The Court: Well, subject to the qualification, Mr. Hunter may be excused.

Mr. Holman: But may he be called back, your Honor, when he's needed with respect to that?

The Court: Well, I assume so, yes. You would come back here if you were called by the defense?

Witness: Yes.

Mr. Holman: I don't want to be captious about it at all, but if I have what I think I have, I want this witness on the stand.

Witness: I would be glad to furnish that, and come back.

Mr. Olson: I just want him released as far as I'm concerned.

The Court: Yes, you're entitled to that.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Wednesday, March 5, 1947, at 9:30 o'clock a.m.)

Yakima, Washington, Wednesday, March 5, 1947

9:30 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

EDWARD C. KEELER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Edward C. Keeler.

Q. Where do you live, Mr. Keeler?

A. Route 1, Yakima.

Q. And what is your occupation?

A. Engineer with the Bureau of Reclamation, Roza Project.

Q. What capacity do you hold? What is your official position with the Bureau of Reclamation?

A. Office engineer.

(Whereupon, final estimate for payment on specification 1062 was marked Plaintiff's Exhibit No. 61 for identification.) [1104]

Q. Showing you, Mr. Keeler, plaintiff's identification 61, I'll ask you what that document is?

A. That the final estimate for specifications 1062-1.

Q. 1062? A. Yes.

Q. And schedule——? A. 1.

(Testimony of Edward C. Keeler.)

Q. Now, does that document, is that one of the official documents of the Bureau of Reclamation records? A. Yes, sir.

Q. Now, does that document, is that one of the official documents of the Bureau of Reclamation records? A. Yes, sir.

Q. Now, does that show in the case of each item of specification 1062, schedule 1, the final estimated for pay quantities and also the final amounts paid in each case, to Macri Company? A. Yes.

Mr. Holman: And deductions, it shown deductions too?

Q. Well——

Mr. Holman: All right, I'll cross. I was trying to save time.

Q. I have no objection; do you mean that deduction for the former payment?

Mr. Holman: No; penalties.

Q. Well, maybe it does. Does it show a penalty deduction?

A. Previous deductions; deductions this month, which may be [1105] for materials wasted, or running overtime on the contract. I don't know what these particular deductions are for here; you'll have to refer to the records.

Mr. Olson: Then, your Honor, I offer in evidence the first page of plaintiff's identification 61 and all of the second page down to and including the gross amount earned.

Mr. Holman: I object to that, your Honor. This is an official document of the government, and they

(Testimony of Edward C. Keeler.)

can't take parts of it and offer it in evidence. In other words, there is a final estimate there, a complete estimate by the government, of Macri's work, and I submit if it is going to be offered, it has to be offered.

The Court: May I see it.

Mr. Olson: The part that I'm offering I believe shows the complete Macri bid, the complete pay quantities, and the complete amount earned and paid. Now, the other information there relates to previous part payments, which I'm not interested in.

The Court: Any other objection to this, other than it isn't complete?

Mr. Holman: Yes, your Honor. I object to the introduction of it as part of plaintiff's case as immaterial, and irrelevant, and outside of the issues as between the plaintiff and the defendant Macri for the [1106] reason that their first cause of action is based upon the sub-contract, and the second cause of action is based upon alleged breach. Now, if it is upon alleged breach that he's offering this, it is wholly immaterial. It is a question then not of paid amounts but of reasonable amounts, and if it is on the first cause of action, I've already lodged the objection which shows that there is no basis for the claim as against any of Macri's earnings as such, and I would like to add to that this, that contrary to the provisions of the sub-contract, there has not been shown in this case any compliance with the

(Testimony of Edward C. Keeler.)

terms thereof with respect to furnishing Macri in advance a schedule of work to be performed by the sub-contractor.

Mr. Hawkins: I also object to the introduction of this exhibit 61. I don't believe it has been properly identified yet. Apparently it purports to show the amount of money paid to Mr. Macri, and purports to be some record from the office of the Bureau of Reclamation. Now, I don't think it is competent evidence to show the amounts paid. I don't think it is material in any event. I can't see how it is part of plaintiff's case, or material, or within the issues, to show what Mr. Macri was paid for his work. It has no bearing on the issues in this case at all, and I repeat, I don't think it's been properly identified. [1107]

Mr. Holman: I will state I had this witness subpoenaed as part of our case, subject to call, at which time I proposed to have him identify all of the estimates, including the final estimate which is a summation estimate, and at that time, as part of our case, I will have them introduced in evidence.

The Court: Your objection, then, is to the order of proof?

Mr. Holman: No, my objection is as I stated, so far as the plaintiff's case, it is immaterial. It is a summation, your Honor, which shows their final estimate, and it can only be based upon the prior story of the other estimates plus the computations in the office. I would like to ask this witness one question.

(Testimony of Edward C. Keeler.)

The Court: Go ahead.

Mr. Holman: Do you yourself make up those estimates? A. No.

Mr. Holman: Or is it Mr. Anderson?

A. Mr. Anderson.

The Court: What is your position in the Reclamation office?

A. Office engineer.

The Court: Are these records under your supervision, part of your office records? [1108]

A. Yes.

The Court: Objection will be overruled. Admitted.

(Whereupon, Plaintiff's Exhibit No. 61 for identification was admitted in evidence.

(Whereupon, Final estimate for payment on specification 1068 was marked Plaintiff's Exhibit No. 62 for identification.)

Mr. Olson: I take it that the agreement that we had before of the right to substitute copies at my expense goes?

The Court: Yes, you may substitute copies.

Mr. Holman: Your Honor, may the same objections go to each one of these estimates?

The Court: Yes, if you wish, the record can show the same objection is made to each of them.

(Testimony of Edward C. Keeler.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Handing you plaintiff's identification 62, Mr. Keeler, will you state what that is?

A. That's the final estimate for specification number 1068.

Q. Does that show the same information with reference to specifications 1068 as the previous plaintiff's exhibit, 61, shows with reference to 1062?

A. Yes, it does.

Q. And is this likewise one of the records of the Bureau of Reclamation made in the office over which you have supervision [1109] and charge?

A. It is.

Mr. Olson: We offer in evidence plaintiff's identification 62.

Mr. Holman: Well, we've already made our record, Mr. Olson.

Mr. Hawkins: We make the same objection, your Honor.

The Court: Yes, the record will show the same objection. I'm not clear as to the materiality of this offer, Mr. Olson. You didn't finish 1068.

Mr. Olson: We never even started it, your Honor, but we have a cause of action.

The Court: Loss of profits?

Mr. Olson: Yes, and it is necessary for us to show the number of cubic yards, I believe, of concrete work that there was in 1068, and this is our method of showing that.

(Testimony of Edward C. Keeler.)

The Court: That isn't shown in the specifications, particularly?

Mr. Olson: Just estimated, your Honor, and this is the actual amount that was in that job. That's the sole purpose I'm offering it for.

The Court: It will be admitted. I might say—you're offering only part of this? [1110]

Mr. Olson: Well, I'll offer all of that.

Mr. Holman: Did your Honor admit only part of the other one?

The Court: I think counsel has a right to offer parts, where they're divisible parts, as part of his case. However, I might say that in order to avoid splitting these documents, if you wish to make an offer of the balance, I don't think it should be split up.

Mr. Hawkins: Your Honor, of course we object to that also.

The Court: Yes, your objection goes to the whole thing.

Mr. Holman: Without prejudice to any motion we might wish to make at the close of plaintiff's case, I would respectfully suggest that the whole of 61 be admitted.

The Court: Have you any objection to that, Mr. Olson?

Mr. Olson: No, not if he's going to offer it.

Mr. Holman: I've already told your Honor that I am going to offer all these estimates.

The Court: I think the whole thing should go in. For the sake of orderly procedure here, I'll just

(Testimony of Edward C. Keeler.)

let the whole of identification 61 in, and then you offered all of 62, didn't you? [1111]

Mr. Olson: Yes.

(Whereupon, plaintiff's Exhibit No. 62 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Keeler, did your office figure the final quantities of excavation paid Mr. Macri under 1062?

A. Yes, we did.

Q. And calling your attention to specifications 1062, and particularly that part thereof which says that except for the limitations described above, excavation for structures will in general be measured for payment to lateral dimensions of one foot outside of the neat line and to slopes of one to one, for common excavation, I'll ask you whether or not that provision of the specifications 1062 with reference to lateral dimensions of one foot outside the foundations of the structures, and slopes of one to one for common excavation, was applied to each and every one of the structure excavations made by Macri and Company on 1062, and if he was paid for excavation on each of those structure excavations to those dimensions?

Mr. Holman: Just a minute. Your Honor, I object, for the reason that the witness has already shown he did not make the computations, and there-

(Testimony of Edward C. Keeler.)

fore as far as this witness is concerned, it would be based upon hearsay information or office information; also for the reason [1112] this witness has already shown he is not the one in charge of the work, but merely in charge of the office, therefore he's not the one that makes the computation.

The Court: Did he testify payment was made through his office?

Mr. Olson: He's the one in charge of the office, and his office is the one that figured this job for payment.

Mr. Holman: I have this in mind in connection with my objection; as your Honor knows, I had Mr. H. T. Nelson arrange to be here to testify as part of our case. I received a communication from his superior showing it can't be done. I've served counsel with notice that I'm taking the deposition of the engineer in charge, Mr. Nelson, and therefore this witness is not the one who had charge of this work. That's correct, is it not, Mr. Keeler, you didn't have charge of this work?

Witness: The work on the project was under Mr. Nelson. The work in the office was under my supervision but his orders.

Mr. Holman: That's my position, your Honor.

The Court: Perhaps you had better develop more in detail how payment was made. Mr. Nelson isn't available as a witness.

Mr. Holman: I've served notice on counsel that I'm [1113] taking the deposition of Mr. Nelson at Boise, if your Honor will let it in.

(Testimony of Edward C. Keeler.)

The Court: Well, that wouldn't help counsel, unless he took a deposition. It is your proof.

Mr. Holman: My position is that Mr. Harold Pease, who has charge of the office and submitted them to the Court, is the officer in charge. This gentleman is the office engineer, and it is much the same, your Honor, as asking the Clerk of this Court or the reporter to speak for your Honor in connection with the Court: It is not the proper witness.

The Court: Well, I think if he had charge of certain work under my direction, and did it, you don't have to certify a copy of my files through me, but you can through the Clerk.

Mr. Holman: That's correct, sir, but he, the witness, has already testified he did not make the computations. They were made by Mr. Anderson.

The Court: Well, they were made under his direction. You can go ahead and develop it.

Direct Examination

(Continued)

By Mr. Olson:

Q. The final figures for payment, Mr. Keeler, were those made in the office over which you have supervision and charge? A. Yes. [1114]

Q. And were they made pursuant to your supervision and direction? A. Yes.

Q. And do you know how the computation was made for payment, as to excavation quantities.

A. Yes, I do.

The Court: I'll overrule the objection. He may answer.

(Testimony of Edward C. Keeler.)

(Whereupon, the reporter read a portion of the question objected to, as follows: "I'll ask you whether or not that provision of the specifications 1062 with reference to lateral dimensions of one foot outside the foundation of the structures, and slopes of one to one for common excavation, was applied to each and every one of the structure excavations made by Macri and Company on 1062, and if he was paid for excavation on each of those structure excavations to those dimensions?")

Mr. Holman: I would like to add to the objection that the question is immaterial and irrelevant, and outside the issues as framed by the pleadings in this case.

The Court: Overruled.

Witness: The yardage paid on each structure excavation was equal to lateral dimensions of one foot outside and one to one slopes.

Mr. Olson: Now, that completes my direct examination [1115] of this witness, your Honor. I'm just going to make this statement, that I assured this witness, and with permission of counsel, and of course subject to your Honor's permission, that if we didn't get through with the cross-examination by five minutes to 10, he's got some bids, apparently, to open back there; I don't know whether counsel can finish in five minutes or not.

Mr. Holman: I agreed with you that I would, sir.

(Testimony of Edward C. Keeler.)

Cross-Examination

By Mr. Holman:

Q. Mr. Keeler, that is what is known as the neat line payment; payment to the neat line?

A. No, neat line payment is made to the outside of the concrete section.

Q. That's for the concrete? A. Yes.

Q. But as to excavation—do you know?

A. I don't quite understand the question.

Q. Is that one foot out a field measurement, or is it a computation measurement in the office?

A. It is a computation measurement.

Mr. Holman: Yes. That's all.

The Court: Mr. Hawkins?

Cross-Examination

By Mr. Hawkins:

Q. Mr. Keeler, if the slope had been dug two to one, what would have been the payment? [1116]

A. Pardon?

Q. If the slope had been dug on a two to one slope, instead of what it was, what would have been the payment? A. Same payment.

Q. In other words, you would have the same payment regardless of the type of excavation actually performed on the job?

A. That's right, in this particular specification.

Q. Yes. In other words, you followed the language of the specification? Would you say yes,

(Testimony of Edward C. Keeler.)

rather than nod your head, so it will be in the record? A. Yes.

The Court: Any further questions of this witness?

Further Cross-Examination

By Mr. Holman:

Q. Well, two to one or any other grade or slope would still be paid only one to one, wouldn't it?

A. That's right.

The Court: If there are no further questions, you may be excused, Mr. Keeler.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: May it please the Court, I was given the opportunity last evening to go over with Mr. James A. Black, the witness that we had subpoenaed and whom counsel called, and I find this arrangement, this difficulty, facing Mr. Black: He is in the field for a telephone [1117] company with a crew of twenty men; he had an arrangement made for a man to replace him while he was here, and that man has now left the job, so it is imperative that Mr. Black return. I told Mr. Black that we had him under subpoena, and we are naturally anxious to cooperate, and the arrangement made between Mr. Black and me is that he will call the Clerk, with your Honor's permission, and give him a place that he can be reached by telephone, and then will respond when the Clerk at my request 'phones for him. Now, if that is satisfactory to

counsel and your Honor, I would very much like to relieve him from his personal distress at present.

The Court: Have you any objection to that arrangement, Mr. Olson?

Mr. Olson: No, your Honor.

The Court: How far is his place of work?

Mr. Holman: Chewelah; he's out in the field some fifteen or twenty miles.

The Court: That arrangement can be made, then.

HAWLEY ROBBINS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Hawley Robbins.

Q. Where do you live, Mr. Robbins? [1118]

A. Sunnyside.

Q. Are you now employed by the Concrete Construction Company? A. No, sir.

Q. Were you employed by the Concrete Construction Company in 1944 on Roza Project 1062?

A. Yes, sir.

Q. And in what capacity? A. Carpenter.

Q. A carpenter? A. Yes, sir.

Q. Do you recall, Mr. Robbins, the approximate time that you were employed on the job?

A. I went on the job on September 6, I think it was, in '44.

(Testimony of Hawley Robbins.)

Q. September 6, 1944, and how long, then, were you on?

A. Wait a minute; until February 27, '45.

Q. Now, what part of the work did you work on as a carpenter?

A. I was setting forms in the field part of the time; part of the time I worked in the yard.

Q. Now, in working in the yard did you have an opportunity to and did you observe the type of lumber that was furnished on this job?

A. Oh, I think I did. I cut up an awful lot of it and put it in the forms.

Q. What was the lumber as far as quality was concerned?

A. Well, I'd call it mighty poor lumber for that kind of [1119] work.

Q. Will you describe a little bit to the Court as to what was the matter with it?

A. Well, one thing was it was wet and green lumber, which would dry and shrink up an awful lot, and then it was awful knotty, poor stuff. Some of it was warped to a certain extent.

Q. Now, anything else about the lumber?

A. Well, if I recollect right, we had some second hand lumber at one time in the yard.

Q. How about that second hand lumber?

A. That wasn't very good stuff; checked and broke up quite a lot.

Q. Checked and broke up, you say?

A. Yes.

(Testimony of Hawley Robbins.)

Q. Now, when you worked out on the field, how did you find the excavations when you came up to one to install your forms?

A. Well, the first thing we had to do was find our hub with the tack in.

Q. Find the hub what?

A. With the tack in it, the nail.

Q. Oh——

A. And of course, we had to find our specific stake on there, which would give us our number of our hub and the [1120] distance each way from it, and everything.

Q. Well, why were you doing that, Mr. Robbins?

A. Well, we had to get them, to get our lines from, to go by.

Q. Well, weren't the excavations all completed and ready for you to work on when you got to them?

A. No, sir, they was not.

Q. Well, then, what did you do after you had to check the line?

A. Well, after we got our lines all set up, then we had to fix our grades, find out where we was at.

Q. And what would be the situation after that?

A. The general situation after that was we had quite a lot of digging before we could get down to grade.

Q. What did you find with reference to the floor of the excavations, as to grade and alignment?

A. Well, all the way from an inch and a half to four or five inches too high, as a general rule, most of the time.

(Testimony of Hawley Robbins.)

Q. How about the alignment? Were the vertical neat cut banks in alignment?

Mr. Holman: Well, just a minute; I submit counsel's question is leading.

The Court: Yes, I think it is leading. Sustain the objection.

Q. Well, just describe the parts of the excavation as far as alignment is concerned. [1121]

A. Well, lots of times we had to dig out the banks to get our forms in, in line.

Q. With reference to the outer banks, or the banks of the excavation, were they sloped, or not?

A. No, they was not.

Q. How were they?

A. They was in a vertical or straight up and down position.

Q. And with reference to clearance after you got the panels in, how much room did you have, or how much room did you have in the hole to put the panels in?

A. Well, it was very seldom that we was able to get a strong-back or a whaler in, whichever you may call them, in without doing some digging, and then probably standing on our head to get our wedges in afterwards.

Q. Now, your strong-backs and whalers, without taking the trouble to come over to the model, just tell the Court what they are?

A. Yes, I can explain that. That's two by fours and stuff that goes on the outside of the form, to keep it from spreading out, so it won't spread and swell when the concrete is poured into it.

(Testimony of Hawley Robbins.)

Q. Perhaps I had better have you—would you just step over here, Mr. Robbins? Mr. Robbins, would you just point out on plaintiff's Exhibit 24, being the structure, which part of it is the strong-back or the whalers, as you call [1122] them?

A. Well, it's this part right along right here, this two by four and stuff, it goes here.

Mr. Olson: I wonder, Mr. Clerk, if for the purpose of the record we might identify with a crayon or pen the part that the witness just referred to.

(Whereupon, a portion of plaintiff's Exhibit 24 was marked 24-a.)

Q. Then referring, Mr. Robbins, to 24-a, is that and the corresponding supports what you refer to as the whalers or strong-backs?

A. That is the support that keeps the forms from spreading in and out when you pour the concrete.

The Court: I don't think he understood your question. He's trying to explain it.

Q. What do you call the part of the form there that is marked 24-a?

A. That would be the whaler or strong-back.

Mr. Holman: I have a question while you're over here. Is 24-a, would a similar marking on 26-a be the same?

A. It would be the same.

Mr. Holman: I ask the clerk to mark 26-a, then, please.

(Whereupon, a portion of plaintiff's Exhibit 26 was marked 26-a.) [1123]

(Testimony of Hawley Robbins.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, when there wasn't room to put your whalers or strong-backs in, Mr. Robbins, what did you do?

A. Well, we had to dig out so we could get them in.

Q. Then when you had your forms completed in the excavations, what would be the situation generally over the excavations that you worked in with reference to the room or the clearance between the outside panel of your form and the bank?

A. Well, there was practically no clearance, because we'd just dig down enough to get room to put our two by fours in, whalers, so that we could get away from there. As far as clearance, we didn't care about that, because there would be no clearance left at all when we'd slide these two by fours down in.

Q. Now, can you tell us, Mr. Robbins, about how much time on the average it was necessary for your carpenters to spend, and how much did you spend, per excavation on preparing it for the structures, as far as your digging was concerned?

Mr. Holman: Just a minute. May I have that question?

(Whereupon, the reporter read the last previous question.)

(Testimony of Hawley Robbins.)

Mr. Holman: I object to the question, your Honor, [1124] as calling for an answer of the witness based upon speculation and memory, without regard to any of the facts or figures in plaintiff's claim.

The Court: Do you have an objection?

Mr. Hawkins: Your Honor, I think there's been no showing as to how many excavations this man worked on.

The Court: Well, that's true, but he's asking him now what the average time was.

Mr. Hawkins: I contend that unless it is shown how many excavations this man worked on, it would be entirely immaterial; for instance, if he worked on five excavations, and the average time was so much, that would neither prove nor disprove plaintiff's case.

The Court: Well, he can't prove them both at once. You have to prove the number first, you think. Do you intend to apply this to the number of excavations, or is it just general in character?

Mr. Olson: Every time we've got notes, then counsel says we're preparing for a lawsuit, and every time we haven't got them, he says we're not entitled to show them. We're entitled to show the general situation, to lead up to what our actual costs were.

The Court: I'll overrule the objection.

Mr. Holman: May I point out that question as now framed calls for both general, and what way did you do; [1125] it is a prolix question.

(Testimony of Hawley Robbins.)

The Court: How do you mean, both ways?

Mr. Holman: As I heard the question, it was average and what did you do.

The Court: Read the question. I thought he asked before what he did, and now the average time on each structure.

(Whereupon, the reporter read the last previous question.)

The Court: Where is there anything in there, Mr. Holman, about what he did?

Mr. Holman: The latter time, how much time did you spend.

The Court: On the average; isn't that the question?

Mr. Holman: If that's what he means.

Mr. Olson: If I asked him "Just how much was it necessary for you to do," counsel will say it is a conclusion, so I asked how much time he was required to and did spend.

The Court: Overrule the objection.

A. Well, I'd say it would run on an average from four to eight man hours a day.

Q. Four to what?

A. Four to eight man hours a day. [1126]

Q. On each excavation?

A. To an average of that.

Q. Now, is that for each carpenter, or for the two of them together?

A. That would be a man hour, for one man.

Q. And how many carpenters were there working on each structure, in putting in your forms?

(Testimony of Hawley Robbins.)

A. Well, generally two of us worked together.

The Court: I'd like to get this as straight as I can as we go along. It seemed to me you asked him the average time spent per structure, and it seems to me he's answering the average time spent per day. Does he mean to say there's four to eight man hours a structure?

Q. That's what I understood. I'll ask him. Do you mean, Mr. Robbins, that that four to eight man hours is on each excavation, or that time is the time you put in each day?

A. That would be average on each excavation.

Q. And there was two men, two carpenters, working on each structure? A. Yes, sir.

Q. Now, to get it clear, do you mean that each man spent that many man hours per excavation, or what do you mean?

A. I mean that between the two of them it would average that much per day.

Q. Well, now, you say per day again, Mr. Robbins. Do you [1127] mean per excavation, or per day?

A. Well, one man would amount to that many hours, not figuring two of them, but one man. Maybe the two of them would work four hours on the digging, and of course that would mean eight hours, the way I mean it.

Q. I say, per excavation?

A. Per excavation.

Q. Now, what was the situation, Mr. Robbins, with reference to whether or not Macri's excavating crew had excavations ahead to work on?

(Testimony of Hawley Robbins.)

A. Well, that depends on what you mean. Do you mean whether they was ahead ready to work on, or whether there was just holes dug?

Q. Well, just tell what the situation was, Mr. Robbins.

A. Well, the situation was that we never come up, far as I know, any time I was on the job, any place that was ready to go to work on. It had to be remodeled over to get your forms in, of some description.

Q. Now, was there ever any interruptions in your work, or delay, or waiting, because of that?

A. Well, that did delay it quite a lot. Every time we was working with a shovel we was sure delaying our work.

Q. Pardon?

A. Every time we was working with a shovel it was delaying our work, because that wasn't our work, not as a carpenter. [1128]

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Robbins, you went on to this job, did you not, as a carpenter? A. Yes, sir.

Q. Not a carpenter foreman, just a carpenter?

A. Not what?

Q. Not a carpenter foreman?

A. No, I'm just a carpenter.

Mr. Olson: Counsel, I forgot a couple of questions. Shall I do it now, or later?

Mr. Holman: No, strike my interrogation; I'll start again.

(Testimony of Hawley Robbins.)

Further Direct Examination

By Mr. Olson:

Q. Mr. Robbins, how come or why was it, if you were out in the field, that you were back in the yard part of the time too?

A. Well, there was some times I was in there on short spells, we would be short on lumber and stuff to put our forms together in the field, and we'd have to go back in the yard and work around there to get in our time

Q. What kind of lumber would it be you were short of?

A. Well, lots of time we was short of whaler lumber, two by fours. [1129]

Q. And when you got back in the yard was the lumber in the yard, or not there either?

A. No.

Q. Well, you'll have to answer the question; was it or was it not in the yard? A. It was not.

Q. Was there any times, Mr. Robbins, when the carpenters had to sit around?

Mr. Holman: I object to this as very leading, your Honor. He's getting yes-no answers from this witness on his own testimony, and I submit it is not proper.

The Court: Well, that seemed to start out to be leading.

Mr. Holman: Yes, quite.

Q. Well, Mr. Robbins, was there any other, outside of the delay that you've described with ref-

(Testimony of Hawley Robbins.)

erence to excavating instead of building and installing forms, were you delayed in any other manner, and if so, what way, and in what respects?

A. Outside building forms, you mean?

Q. I didn't get your question.

A. I say, did you mean outside of the carpenter work?

Q. No, I mean particularly in reference to the carpenter work. What I'm getting at is was there anything else that you can tell us about the delay, other than the digging [1130] that you did?

A. Oh, there was lots of times we was delayed for lumber, far as that goes, time and again, and there was one time that an order come out there that we wasn't to do no digging; if we come up on to a structure that wasn't up to sub-grade, we was to wait. Well, I was put on a structure, and I had to wait a half a day before the relief man came around; I sat there half a day, me and my men, on account of no sub-grade for us.

Q. Did Mr. Macri's men come back eventually and do the sub-grading, or do you remember?

A. Well, at that time I was taken out of the field and went into the yard, building forms and getting stuff ready for another job, for a tunnel job, and I didn't go back on the job out there after that.

Mr. Olson: You may examine.

(Testimony of Hawley Robbins.)

Cross-Examination

By Mr. Holman:

Q. You say at that time you were taken out of the yard and put on another job, for a tunnel?

A. Well, it wasn't a tunnel, it was kind of a—well, it was a long flume, is what it was.

Q. On this 1062, however?

A. Yes, that was on this 1062.

Q. Now, may I ask, please, you went on the job as a carpenter on September 6, 1944, and you were not, while you were on [1131] the job until February 27, 1945, a carpenter foreman?

A. Not as carpenter foreman, no, sir.

Q. At no time were you employed as an excavator or fine grader?

A. Only when I come up on there, when I had to; not employed as that.

Q. I'm talking, sir, about your employment. You weren't employed that way?

A. I was employed as a carpenter.

Q. And what was your compensation per day as the carpenter?

A. What do you mean by that?

Q. What was your pay?

Mr. Olson: I think, your Honor, that's immaterial.

The Court: I'll overrule the objection.

Q. How can it be immaterial?

A. Whatever the standard scale was at that time. I think it was \$1.40.

(Testimony of Hawley Robbins.)

Q. \$1.40 per hour, sir?

A. It was either \$1.40 or \$1.45.

Q. Can you tell me, counsel?

Mr. Olson: No, I can't.

A. I've forgot just exactly what the scale was. It was standard scale.

Mr. Holman: May I have that 16, Mr. Clerk. It is agreed, counsel, by reference to identification 16, that [1132] the pay of the carpenters during the period this man worked was \$1.40 per hour?

Mr. Olson: That's correct.

The Court: The record may show that.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, how long after you started to work in September, 1944, did you stay in the yard making forms?

A. I didn't stay in the yard when I first started to work at all; I was out in the field.

Q. Oh; how long, then, was it before you went to the yard? Do you know, sir?

A. I don't recollect when I did go back into the yard.

Q. Had you ever been a fine grader?

A. Had I ever been a fine grader?

Q. Yes, sir, before you went to this job?

A. Oh, I worked on a lot of work, dirt work, and stuff like that, before that, on other jobs. Not on that one.

(Testimony of Hawley Robbins.)

Q. Sir?

A. I've worked at that kind of work on other jobs.

Q. And on Reclamation projects, sir?

A. No, sir.

Q. So this was your first reclamation project you worked on? A. No, sir.

Q. What was the first one?

A. I worked on one, the Roza Project, down by Zillah. [1133]

Q. I guess you misunderstood me.

The Court: He said he worked before as a fine grader, but not on Reclamation projects. He's worked on other Reclamation projects as a carpenter.

Q. Then this was the first position that you worked with respect to excavation, in doing excavation, right? A. Well, yes, where I had to.

Q. All right, sir. Now, when you first went to work, were you taken out into the field?

A. Sure.

Q. And you didn't build the panels for the forms?

A. No, the panels was built in the yard.

Q. Sir?

A. The panels was built in the yard.

Q. At the time you came on that job they were pouring concrete, were they not?

A. Yes, I believe they were.

Q. Sir? A. Yes, sir, they were.

(Testimony of Hawley Robbins.)

Q. And your employment was during the period that the carpenters—strike that—that the concrete was being poured, right?

A. Well, they were pouring concrete in that period, yes.

Q. Mr. Robbins, were you employed locally, or had you been employed with Concrete Construction Company before that? [1134]

A. Before that?

Q. Yes.

A. No, I was employed by them, that was my first time.

Q. In other words, you were a local man?

A. Yes, sir.

Q. And what was your particular function with respect to the assembling of panels into forms? What did you do?

A. Why, I assembled them, set them up, put them together.

Q. Well, did you have a carpenter foreman there that directed you, or not? You said there were two of you; was the other a foreman?

A. No, there was no foreman with us. We worked together. We had our print, and went by our print.

Q. Sir?

A. I say, we had our cut, and went by our cut.

Q. Your cut?

A. Yes, the print or form, how it was supposed to be.

Q. The lay-out?

A. The lay-out.

(Testimony of Hawley Robbins.)

Q. Referring to Exhibit 12?

A. Yes, this would be the form.

Q. Can you talk up a little, Mr. Robbins? It's hard to hear you, sir. Then you as carpenter and one other with you——

A. Yes, sir.

Q. ——assembled the forms? [1135]

A. Yes, sir.

Q. From the panels? A. Yes, sir.

Q. That you brought out on the job; did you pick the panels, or were they sent out to you?

A. They were sent out on the job.

Q. Now, how long did you stay out in the field before you went to the yard to work in the yard?

A. Well, I can't recollect just exactly.

Q. Well, will you please do your best? You said you started September 6.

A. I don't know for certain whether it was in January or December, some time, when I went back into the yard.

Q. In other words, it is your best recollection that from September 6 until December or January you stayed in the field, and not in the yard, sir?

A. Not continuously in the yard. I was in the yard for short times.

Q. Yes, but your operations were in the field?

A. Supposed to be, yes.

Q. Yes, sir. Now, then, the thing I'm interested in is when it was this wet lumber came to you.

A. Well, I couldn't say as to when that was.

Q. When was it that the knotty lumber came to you? Was it all the same time, or different times?

A. It was all in the same time.

(Testimony of Hawley Robbins.)

Q. All right; then it was wet, and it was knotty, and what else? A. It was green, too.

Q. Well, that's what you mean by wet, isn't it?

A. Wet and green.

Q. In other words, fresh cut, sir?

A. Yes, it would be.

Q. When was that, approximately?

A. Well, I wouldn't say when it was brought in.

Q. Well, could you tell me whether it was September or January?

A. Well, I couldn't say what month it was in; I know it was brought in there.

Q. Did you make any report? Who was your superior, Mr. Darcy? A. Yes, sir.

Q. He was in charge there as chief carpenter foreman, was he not?

A. He was in charge of the job.

Q. And did you make any report to him of that lumber?

A. He was right there and seen it himself.

Q. Please, sir, I asked you if you made any report?

A. No, I didn't make no report to him.

Q. All right. You told counsel that you had lots of digging [1137] to do, that the excavations were from one and a half inches to four inches or five inches too high. Now, had that been fine graded four to five inches too high, sir?

A. Well, if they had been fine graded they sure wasn't fine graded down to grade.

(Testimony of Hawley Robbins.)

Q. No, had they been fine graded—you know what a fine grade is, do you not, sir? A. Yes.

Q. Well, had they been fine graded?

A. Well, I think they attempted to fine grade them, but they didn't fine grade them.

Q. Then your testimony is that they had been fine graded as much as four or five inches too high?

A. Yes, some of them was.

Q. When was that?

A. Well, that was all the way through on the job.

Q. All right, give me when you found any fine graded four or five inches high.

A. That's an awful hard thing to say, this long a time.

Q. Well, this is rather an important matter. Can you tell me approximately when, sir?

Mr. Olson: Your Honor, he's answered "all the way through the job."

Mr. Holman: May it please the Court, I just would appreciate it if counsel would not interrupt. If [1138] he wants to make an objection, that's all right.

Mr. Olson: That's what I'm trying to do, on the ground the witness has said it was all the way through. Now, he says, "Can you state a time"; I don't see what he could do.

Mr. Holman: In other words, counsel would like to cross-examine.

The Court: What is the last question?

(Testimony of Hawley Robbins.)

(Whereupon, the reporter read the last previous question.)

The Court: I'll sustain the objection. He already said "all through the job," as I recall.

Q. Four or five inches all through the job, sir?

A. I didn't say four or five; I said they run from one and a half to four or five.

Q. That's what I had there. Now, what I'm asking you, I think it is proper under the witness's answer, can you give me even a lateral where you claim there was four to five inches above grade after it had been fine graded, even the lateral?

A. I couldn't give the numbers of the laterals now.

Q. Can you give me the stations, the structures?

A. No, I couldn't give you the numbers on them, because I didn't mark them down, and don't know what they were.

Q. Did you make any report thereon to your superior, either [1139] your chief carpenter foreman or Mr. Darcy? A. Yes, I say we did.

Q. Did you give them a station where you found this?

A. Well, he knew what station I was on.

Mr. Holman: I move that be stricken, your Honor. I asked if you gave it; in other words, here's a witness's conclusion. I don't think that is proper.

The Court: You asked if he reported, and he said he did. Now you're asking if he reported the number of the station. What is the answer to that?

(Testimony of Hawley Robbins.)

Mr. Holman: He's stating that he knew the other man knew.

The Court: That will be stricken.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: Answer yes or not.

Mr. Olson: I think it is wholly immaterial.

The Court: It seems to me a useless question, but did you tell them the station?

A. I didn't necessarily tell them the station.

The Court: All right, the answer is no.

A. They knew what it was.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you make any record yourself of any of the stations where you found fine grading too high?

A. No.

Q. Now, may I understand, sir, is it your testimony that for, let's say roughly in excess of 500 structures, call it 500 structures, for the purpose of illustration here, that for 500 structures on 1062, they averaged from four to eight man hours per day, right? In other words, 500 times four of 500 times eight man hours per day, is that correct?

The Court: Just a moment. I don't think that's a completed question, is it?

Mr. Holman: I thought it was, your Honor.

The Court: You asked him for an answer, be-

(Testimony of Hawley Robbins.)

fore you got through, you said they averaged four to eight man hours; for what? Do you mean extra work, or total work?

Mr. Holman: Taking 500 structures, do the 500 structures average four man hours per day, or eight man hours per day, or between that?

The Court: For what?

Mr. Holman: On his testimony here as to excavations.

The Court: Well, you hadn't said so in your question.

Mr. Holman: I see, your Honor. Strike the question and I'll ask it over.

Q. Assuming that there are 500 structures on this job, is it [1141] your knowledge that there was four man hours, at least, per structure, per day, expended in excavation?

A. Well, I wouldn't say as to the complete job, because I didn't work on every one. I'm going by what structures I worked on.

Q. Then when you answered counsel "per structure," you meant the structures you worked on only? A. Yes.

Q. How many structures did you work on?

A. I couldn't say as to that, but quite a few.

Q. How few did you work on? At least how many did you work on?

A. Well, I think I set up around, between 75 and 100 of them.

Q. You set up between 75 and 100 structures?

A. That I worked on, I'm pretty sure.

(Testimony of Hawley Robbins.)

Q. But you can't tell me the laterals, and you can't identify the structures?

A. I couldn't, not now. I kept no record of it.

Q. Now, then, is your testimony with respect to that average limited to the structure area in which you set up structures?

A. Well, it's limited to the ones that I worked on.

Q. That's what I want to get at, sir. Now, you say the average was from four to eight hours a day?

The Court: Just a moment, Mr. Holman. Didn't he [1142] say four to eight man hours per structure, on each structure?

Mr. Holman: No, a day on each structure, your Honor; four to eight man hours a day on each structure, is what I had.

The Court: All right, go ahead.

Q. Isn't that correct?

Mr. Olson: No, I understand that's four to eight man hours per structure.

The Court: I asked specifically whether he was talking about days or structures, and he said structures.

Mr. Holman: I think that was clarified, your Honor.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Then it is your statement, sir, that there were at least 300 man hours of your time or of the two of you, on the 75 structures, minimum, that you worked on, is that right?

(Testimony of Hawley Robbins.)

A. I think it would average to that.

Q. Sir?

A. I think it would make an average of that.

Q. Why do you say from four to eight hours?

A. Because some of them we run less, and some of them more. Some more digging than others.

Q. None of them less than four hours?

A. Not that I know of, on anything I worked on. [1143]

Q. And none of them more than eight hours?

A. Well, there might have some of them run more than eight hours. I said that would be an average of that.

Q. All right, sir. Was there a time, sir, that you worked exclusively in the yard? Was there a time that you worked exclusively in the job yard as distinguished from working in the field?

A. Yes, along toward the latter part.

Q. How long a time did you work in the job yard?

A. Well, I believe it would be a month and a half or two months, something like that.

Q. Sir?

A. Around a month and a half or two months, toward the last of it.

Q. Around a month and a half, you say?

A. Something like that; I wouldn't say.

Q. Then that is approximately ninety days you spent on the structures?

A. Huh?

(Testimony of Hawley Robbins.)

Q. Approximately ninety days you were on the structures?

A. Well, I couldn't say for certain as to that.

Q. You told counsel that one time an order came out "that we weren't to do any digging." Order from whom, and how did it come out to you, sir?

A. I heard that come through Macri. [1144]

Mr. Holman: I move that that be stricken, your Honor. It is strictly not responsive. He's telling what he heard.

The Court: I'll grant the motion to strike. He can say as best he can where the order came from.

Q. How did the order come to you, sir?

A. The order come to me from my foreman.

Q. And who was he? A. Pat Darcy.

Q. Pat Darcy told you this?

A. That there was to be no more digging.

Q. Yes, sir. All right, sir; and when was that?

A. Well, I couldn't say as to the specified time.

Q. Can you give me the month, sir?

A. Oh, I don't know as I could, now.

Q. Can you tell me whether you got that while you were out setting forms, or while you were in the job yard?

A. That was while I was out setting forms.

Q. Out setting forms. All right. It was not a written order? A. No.

Mr. Holman: Just told to you. That's all.

(Testimony of Hawley Robbins.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Robbins, do you recall any time when there were excavations that were fine graded by Macri and Company [1145] ready to receive forms?— A. No, I do not.

Q. Just a moment, I haven't finished my question; and you did not have the forms ready to put in these excavations?

A. No, I don't recall no time but what we had forms ready.

Q. Isn't it a fact, Mr. Robbins, that there were a great many occasions when you had forms ready for excavations that were not fine graded, and at the same time there were excavations that were fine graded, but for which you did not have forms ready?

A. No, I don't recollect of any time that happened.

Q. You don't recollect of any such time? Mr. Robbins, I take it you've been a carpenter a good many years, is that right?

A. Well, one or two years.

Q. One or two years? I understood that you had done some work, form work, prior to the time you were on this job; is that right, or not?

A. For other parties?

Q. Yes. A. Yes, sir.

Q. And is it not true, Mr. Robbins, that the car-

(Testimony of Hawley Robbins.)

penters setting the forms always have to do a certain amount of shovel work?

Mr. Olson: You mean on this job [1146]

Mr. Hawkins: On any job.

Mr. Olson: That's objected to, if the Court please, as being immaterial, what they had to do on other jobs. A. No, it is not.

The Court: Well, I'll overrule the objection. He answered, I think.

Mr. Olson: I'll withdraw the objection, then.

Q. It is your testimony, then, that a carpenter never, in setting forms, has to use the shovel?

A. Not if he's caught with his union man, he won't.

Mr. Holman: I'm sorry, your Honor, I just can't hear this witness.

The Court: Well, I think the answer was not responsive.

Q. As I understand it, he said if you're a union man you don't get caught with a shovel in your hands, or something of that sort, but you used a shovel on this job, didn't you, sir?

A. Yes, sir.

Q. And you're a union man?

A. Well, I'm supposed to be, but I broke the union rules out there to keep going.

Q. As I understand it, you were out there from September 6, 1944, to February 27, 1945? [1147]

A. Yes, sir. .

(Testimony of Hawley Robbins.)

Q. That would be a total of 170 days, isn't that right?

A. Well, I couldn't say for sure; I never figured it up.

Mr. Olson: That's mathematical, your Honor.

Q. And there's 170 days between those two dates; assuming it is 170 days, did you work Saturdays on this job? A. Yes.

Q. All day? A. Yes.

Q. This was a six day week? A. Yes.

Q. Did you work Sundays on this job?

A. No.

Q. Taking off Sundays and holidays, or a total of about 25 days, for that purpose, that would leave about 130 days that you were actually on the job out there; would that be about right, to your recollection?

A. I couldn't recollect how long it was, far as that goes.

Q. Then you testified you spent about a month and a half in the yard, is that right?

A. Yes, as near as I can recollect.

Q. That would be about 60 days; deducting that from the figure of 130, that leaves about 90 days you spent out on forms, sir, setting forms?

A. I couldn't say. I know I was working out there. [1148]

Q. Now, you testified you set the forms for 100 structures; I believe that was your testimony?

A. I set between 75 and 100.

(Testimony of Hawley Robbins.)

Q. Yes, 100 structures. Now then, if you spent eight hours per structure on shovel work, that would be 100 days, would it not, spent on shovel work?

A. I didn't say that we spent eight hours total.

Q. Yes; that's what I'll get at in a moment; and as a matter of fact, however, you only spent a total of 90 days, not only shovelling, but setting the forms too?

A. Well, there was two of us working together all the time.

Q. Well, there must be something radically wrong with your estimate of four to eight man hours per day per structure then, isn't there?

Q. That's what I tried to say. I understand this witness testified that on each structure there was spent four to eight man hours in shovel work. My question was, then, there must be something radically wrong with your——

Mr. Olson: That question is argumentative. Counsel's mathematics have been wrong from the beginning. The witness said he worked a month and a half. Counsel [1149] got that 60 working days, but his last question is certainly argumentative.

The Court: What was the last question?

Mr. Hawkins: My last question was that there must be something radically wrong with his estimate of four to eight man hours per structure spent in shovel work.

The Court: Well, I'll sustain the objection. It is argumentative.

(Testimony of Hawley Robbins.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Did you work on any structures of which Exhibit 23 and 24 are typical, that is that first model over there?

A. Structures of that description?

Q. Yes. A. Yes, sir, I have.

Q. Can you tell me whether that form was all set in at once? A. No, it wasn't.

Q. You'd set in part of the form?

A. Set in part of the form at a time.

Q. That is one panel at a time?

A. One panel at a time.

Q. What I'm getting at is this: would you set half of that form and pour it, and then set the remainder and pour the balance, or was there just one setting and one pour?

A. There would be one setting and one pour.

Q. One setting and one pour; you would put in that entire [1150] form at once, then, before there was any pour?

A. You would put it in and get it all fixed, yes.

Q. Did you have any trouble with the dirt caving down when you set your forms?

A. No.

Q. You never knocked any dirt down in the trench when you set your forms?

A. Well, we did in some places, yes.

Mr. Hawkins: That's what I thought. That's all.

(Testimony of Hawley Robbins.)

The Court: Redirect?

Mr. Holman: May I have just a minute, your Honor?

The Court: Do you have any examination, Mr. Ivy?

Mr. Ivy: No, your Honor.

The Court: And you say you have no redirect?

Mr. Olson: No, your Honor.

The Court: The witness may be excused, then.

(Whereupon, there being no further questions, the witness was excused.)

ISAAC A. LYONS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Isaac A. Lyons.

Q. Where do you live, Mr. Lyons?

A. Sunnyside. [1151]

Q. Are you now employed with or have any connection with the Concrete Construction Company?

A. No, sir.

Q. In 1944 were you employed on specifications 1062 of the Roza Project?

A. I went to work for the concrete outfit of Portland on the 17th day of September, and quit March 3, '45.

(Testimony of Isaac A. Lyons.)

Q. And where was that employment, Mr. Lyons?

A. Out on the Roza.

Q. And in what capacity were you employed?

A. As a carpenter.

Q. Now, were you working in the field setting forms, or in the yard?

A. In the field most of the time; once in a while in the yard.

Q. Now, in the field, would you just, as you came up to an excavation would you just describe what you did with reference to the excavation?

A. First thing you look for your hub. There's a stake there with your figures on, what you want. You measure from there to set it. On the opposite direction from it would be another. You get your lines from there. You get your elevation from on this stake, what you want. Then there's supposed to be some other hubs to get your line wall, and sometimes it wasn't there and you had to [1152] figure it out from your hub stake.

Q. Now, what did you do then with reference to the excavation, if anything?

A. Well, when you got your elevation, you see where your forms, if your ground is low enough for your forms to fit on.

Q. And what did you find out in that regard?

A. Sometimes it wasn't.

Q. And what did you do about it?

A. Well, we had to grade out.

Q. And how did you do that? What kind of tools did you use?

(Testimony of Isaac A. Lyons.)

A. Had to use a shovel, and sometimes a pick.

Q. Now, how general would that be, Mr. Lyons, as to the excavations that you worked on?

A. Well, sometimes it amounted to—sometimes we had to dig an end out for a line wall.

Q. Dig what out?

A. The end, so the back wall would fit in; they wouldn't have it dug long enough for your outside wall; it run all the way from an hour, a man hour, to eight man hours on some jobs.

Q. Now, you say on some jobs?

A. Yes, some laterals it wouldn't be that way all the way through; some of them would be harder, some of them more banks to take off, where you had a big form to put in, a [1153] long form; sometimes they didn't have it dug long enough for your outside form.

Q. Now, your one to eight man hours, Mr. Lyons, that refers specifically to what?

A. One man hour being just one hour.

Q. On what?

A. On this digging. If it was eight you would figure eight man hours.

Q. Well, are you referring to that much per day, per week, or what?

A. Well, it wouldn't be every day that way, but when you go to this form you set in, that's the way it would be. Some of them was bigger, and some of them small.

Q. Well, how many structures would you spend that much time on?

(Testimony of Isaac A. Lyons.)

A. Well, I couldn't swear to that. As a general rule I was on pretty good-sized forms, and it would take a little longer to set them in.

Q. Well, what was the situation with reference to the banks?

A. The banks was pretty steep. When we put our strong-backs on lots of times all we'd do, I shoved the whole thing down and stuck in the she-bolts, and let the party that wants to take the strong-backs out figure out a way to get them down. I didn't slope the banks down. I dug down and bent over and got my she-bolts in. Whoever took [1154] the forms out, they had to figure that out.

Q. Was there room, without digging, to get your strong-backs in, or what was the situation?

A. No, sir, with deep holes where they set low there wasn't.

Q. And what did you do?

A. We wiggled down and reached down and got our strong-backs in, and then we dug out and got the she-bolts in. Our she-bolts had to fit down between our strong-backs; we had to dig a hole so we could get her in.

Q. Now, on your arrival were the holes and the banks of the excavations in proper alignment with reference to these hub stakes you refer to?

A. Well, you see, that's your center, and you took your center and measured both ways to the center of where your back wall goes. Some of them is 26 feet long, 24 feet, I think it was, and lots of times your ends wasn't dug long enough for that, and we'd have to dig out for the ends.

(Testimony of Isaac A. Lyons.)

Q. Now, were there, when you finished with an excavation and got your structure in, what was the situation with reference to whether or not the next hole was ready for you to work in?

A. Pardon me?

Q. When you had your forms in and completed with one excavation, so that you then went to the next one, what was [1155] the situation with reference to whether you would find the next one ready for you to work in?

A. Well, the majority, all of them, we had to do something to.

Q. Now, you say you were in the yard part of the time too?

A. In and out. I wasn't in the yard so very much.

Q. Why was it you were in the yard?

A. Well, lots of times we would be short of material out there.

Q. So then you would do what in the yard?

A. We'd come in and prepare forms.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Lyons, did you have an opportunity to and did you examine the lumber that was furnished on this job?

A. Well, the lumber was——

(Testimony of Isaac A. Lyons.)

Q. Well, first, did you? A. Yes, sir.

Q. And would you describe that lumber as far as quality was concerned, that you saw?

A. Well, a lot of the lumber we repaired forms with was awful warped, the new lumber was cracked and was awful wet and knotty; we'd have to use the lumber with the [1156] knots in up to a certain size hole, and then we would tin them; we cut tin and nailed over the knot holes.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Lyons, can you tell me the location with respect to laterals? A. No, sir.

Q. I hadn't finished my question yet.

A. When we got through one lateral——

The Court: Just a minute, wait until he finishes the question.

Q. Can you tell me the laterals upon which you say they had deep holes that you worked on?

A. I couldn't tell you laterals because we——

Q. Can you tell me the structure numbers?

A. No, sir.

Q. Did you give to Mr. Darcy or any other of your superiors any record of the holes you worked on?

A. Every time he'd come, he'd move us.

The Court: Just a moment; just answer the question.

Mr. Holman: I move that be stricken.

The Court: Yes, it may be stricken.

(Testimony of Isaac A. Lyons.)

A. Yes, sir.

Q. What I'm asking you is this: Did you give Mr. Darcy a record of the time you spent on these various holes, for [1157] digging?

A. Every time we sub-graded any we give him the time.

Mr. Olson: Did you give him——

Mr. Holman: I think he answered.

(Whereupon, the reporter read the last previous answer.)

Q. And would you give him the station?

A. He had our station number. He kept track of our station number we worked at, we didn't give him the station number.

Mr. Holman: I move that first part be stricken.

The Court: I think it's explanatory.

Mr. Holman: That isn't my point. He's telling what Mr. Darcy did, and I submit that's not part of the answer.

The Court: Well, he says that he kept track of the time and gave Mr. Darcy the time and the structure they were working on, but not by number; that's what he's testifying, isn't it? A. Yes, sir.

The Court: I think that is nearly enough responsive so that we can understand.

Q. What do you mean by the structure you were working on, but not the number?

A. We never kept track of the number of the structure we [1158] worked on at all. We went out on a structure and worked on it, and when we fin-

(Testimony of Isaac A. Lyons.)

ished, I moved up to another one. I never kept tab of the structure we were on.

Q. You say Mr. Darcy was there?

A. He'd come and get us when we finished our job, and delivered us to the next.

Q. Now, is that the time, right then, that you gave Mr. Darcy the amount of time that you excavated?

A. Yes, sir.

Q. You would give the time, that you had done so much work on a structure?

A. So much excavating, yes, sir.

Q. And would you give him the amount of excavating you did?

A. That's the amount of time we put on excavating.

Q. Yes, sir. Now, did you yourself do the measuring for the structures?

A. There was two of us.

Q. Well, you and another carpenter?

A. Yes, sir.

Q. Not Mr. Darcy?

A. All he done was delivered us there.

Q. He just delivered you, and then he'd go on somewhere else?

A. Tell us what it was, and that would be all.

Q. And what Mr. Darcy would do would be to show you these lay-out drawings, that is, Exhibit 12, and say "This is [1159] the structure"?

A. The stuff was there on the ground, and he told us there what to do, and he'd come back in the meantime.

(Testimony of Isaac A. Lyons.)

Q. The forms would be delivered there, you wouldn't deliver the forms there; you wouldn't go to the yard and get them, would you?

A. We couldn't.

Q. Well, you didn't, did you, sir?

A. No, sir.

Q. They would be there on the job, and then you'd assemble the forms? A. Yes, sir.

Q. Did Mr. Darcy furnish you with the picks and shovels? A. Yes, sir.

Q. Can you recall any one structure that you can identify to the Court now that you say was a deep structure? A. By number?

Q. Yes, sir. A. No, sir.

Q. Now, you say sometimes you had to dig the end out? A. Yes, sir.

Q. That would be the extension walls——

A. Yes, sir.

Q. ——of the structure, because the excavation was not as wide as the forms had been built, is that right? [1160]

A. It wasn't built long enough for the forms.

Q. Yes, sir, and in those instances do you say that the excavation was not as wide as the drawing?

A. Yes, sir.

Q. You say they were not as wide as the drawing?

A. Wasn't laid out to the classification of the form.

Q. Well, isn't it a fact that without checking as to that length, you excavated to make your form fit on those wings?

(Testimony of Isaac A. Lyons.)

A. If your forms call for a hole larger than the one that's excavated, you sure would have to excavate it out to get it in, wouldn't you?

Q. Yes, sir.

A. That's just what we done.

Q. Now, regardless of what the forms called for, the forms that were actually delivered were the ones you set in? A. Yes, sir.

Q. And if the excavation was not far enough out for those wings, those walls, then you would excavate on out? A. Yes, sir.

Q. In other words, you made it fit the form, correct? A. That's it.

Q. Now, may I ask, please, sir, when you say it ran all the way from one hour to eight man hours on some jobs, is the substance of your statement as I have my note, you [1161] mean, do you not, that it ran all the way from one man hour to eight man hours per structure, depending on the size of the structure? A. The depth, the width, yes, sir.

Q. I have a clear understanding of that, have I not? A. Yes, sir.

Q. Did you keep a time book yourself?

A. No, sir.

Q. You were not a carpenter foreman, were you?

A. No, sir.

Q. Who was your superior carpenter foreman?

A. Darcy.

Mr. Holman: Mr. Darcy. That's all.

(Testimony of Isaac A. Lyons.)

Cross-Examination

By Mr. Hawkins:

Q. Were you in Court when Mr. Darcy was testifying? A. Pardon?

Q. Were you in court when Mr. Darcy was testifying? A. I didn't understand you.

Q. I say, were you in court when Mr. Darcy was on the witness stand? A. No, sir; I wasn't here.

Q. I see. When you were setting forms were Mr. Macri's fine graders ever in your way?

A. Who?

Q. Were Mr. Macri's fine graders ever in your way? [1162]

A. He wasn't there when I first went there.

Q. No, I say Mr. Macri's fine graders.

A. I never seen any of them.

Q. You never saw any of them? They were never in your way?

A. Well, the fact is they never was around, if they had any.

Q. Yes. How many structures did you work on, sir? A. Sir?

Q. How many structures did you work on?

A. I never kept track of them.

Q. Do you have any idea how many there might be? A. No, sir.

Q. You couldn't estimate? A. No, sir.

Q. Did you work on all of the structures on the job?

A. I didn't work on all of them.

(Testimony of Isaac A. Lyons.)

Q. You didn't work on all of them?

A. No, sir.

Q. Is it not a fact, Mr. Lyons, that there were excavations that were fine graded by Macri for which you did not have forms ready?

A. Well, I don't know of any I was on but what we didn't have to do something. Sure enough we didn't turn no time in for some of them, because it only took a little time to do it.

Q. I don't think you get my question. Were there any excavations fine [1163] graded for which you did not have forms ready at the time they were fine graded? A. I don't know about that.

Q. You don't know about that, and as a matter of fact, did you not have forms ready for excavations that were not fine graded when at the same time there were excavations that were fine graded for which you did not have forms ready?

A. I couldn't say about that.

Q. So fas as you know that was never true?

A. I wouldn't say anything about that. I wasn't in the field running around to see what they had done. We was taken out to where there was forms.

Q. Who directed you as to which excavations to work on? A. Our foreman.

Q. Mr. Darcy? A. Yes, sir.

Q. Did you work on any structures such as 23 and 24, the model over here? A. Yes, sir.

Q. Was the form completed and installed before any concrete was poured? A. Yes, sir.

Q. In other words, you did not build part of the

(Testimony of Isaac A. Lyons.)

structure at one time, pour the concrete, build the remaining part [1164] of the structure and pour the balance of the concrete? It was all poured at once?

A. I think you'd have to do it that way.

Q. No, I'm just asking you if you did.

A. It was all built before the concrete went in.

Q. It was all built complete before the concrete went in? A. Yes, sir.

Mr. Hawkins: That's all.

Mr. Ivy: No questions.

The Court: Any redirect?

Mr. Olson: That's all. May Mr. Lyons and Mr. Robbins be excused, your Honor?

The Court: All right, they may be excused from further attendance.

(Whereupon, there being no further questions, the witness was excused.) [1165]

WILLIAM E. SCHAEFER

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. Olson:

Q. You have already been sworn, I think, Mr. Schaefer? A. Yes.

Q. Your name is what?

A. William E. Schaefer.

Q. And you are a brother of M. C. Schaefer, plaintiff? A. Yes.

(Testimony of William E. Schaefer.)

Q. Where do you live, Mr. Schaefer?

A. Portland, Oregon.

Q. Now, what capacity, if any, did you have on this job 1062? A. General superintendent.

Q. And were you at the same time general superintendent of any other jobs? A. Yes.

Q. Now, there's been testimony, I think, by your brother, Mr. Schaefer, that during the time——

Mr. Holman: Just a minute. Your Honor, I submit that is a leading type of question.

The Court: Well, I think it is preliminary. Go ahead and we'll see what you're going to.

Direct Examination

(Continued)

By Mr. Olson:

Q. There's been testimony by your brother, Mr. Matt Schaefer, that during the time that 1062 was being performed, this period of approximately twelve and a half months, that during that time Mr. Schaefer and the Concrete Construction [1166] Company had some 200 other jobs. Now, my question is, would you describe, not in detail but just in general, the type of these jobs?

A. Well, that would be pretty hard, because they run all the way from a sidewalk patch to another job that required about four or five thousand yards of concrete; driveways, steps, basement floors.

Q. Did you have 200 jobs going on besides this 1062? A. Not at one time.

Q. Now, when were you first on this Roza Project, 1062? A. March 9.

(Testimony of William E. Schaefer.)

Q. That was prior to the contract?

A. Yes.

Q. Now, when were you on it next with reference to going to work on the job?

A. I believe it was March 15.

Q. All right, now on March 15 did you take anybody with you, or what did you do on March 15?

A. I brought up a carpenter from Portland.

Q. A carpenter from Portland?

A. Yes, A. E. Mercelle.

Q. Was there anybody else that you put on the job then? A. I don't believe that day.

Q. All right; now, was there anybody on the job then that you took into your employ? [1167]

A. Yes.

Q. And who was that?

A. John Klug and Bob Monrad.

Q. And Bob Monrad? A. Yes.

Q. And Mr. Monrad and Mr. Mercelle are two of the gentlemen who have testified here in court?

A. Yes.

Q. Now, what did you put them to doing, if anything?

A. They were already started to building form panels. John Klug was the foreman and he gave Mercelle orders on what he wanted him to do.

Q. All right; now, do you know when you were up on the job again, approximately? You can refer to some memo, if it is a memo that you yourself made, as to when you went.

A. I have a note that I took on the job.

(Testimony of William E. Schaefer.)

Q. I just want to know the approximate date that you were on there next.

A. I think it was about March 31. I went up to build a cement shed.

Mr. Holman: This is all 1944?

Q. The dates are all in 1944? A. Yes.

Q. You were up for what purpose?

A. The building of a cement shed. [1168]

Q. This is still setting up your project?

A. Yes.

Q. Well, I will ask you during that time what was going on with reference to building panels?

A. Still building panels in the yard.

Q. Were there any excavations ready yet?

A. No.

Q. All right; when did you come up next?

A. That was April 15.

Q. All right; and what was going on? What did you see on that date?

A. That's when they started to build structures out in the field.

Q. Now, what was the situation, or describe the the type of excavations into which you were setting the structures, and what took place, and what was done.

A. Well, Fred Waltie, the superintendent, and——

Q. Whose superintendent?

A. Concrete Construction Company superintendent, and a few of the carpenters were started in structures 1, 2 and 3 when I got there, and they

(Testimony of William E. Schaefer.)

were digging, they were excavating some of the vertical walls so they would have room for their forms, and one part of this hole they were excavating for the invert, that is the floor to receive the concrete. They showed me where the excavation was [1169] too close, they couldn't get their form in, so they started digging, so I got in touch with Mr. Staples, Macri's foreman——

Q. Who was he?

A. Macri's superintendent, and showed him the situation, and told him we didn't want that to happen very much there, because right now we was willing to get started on this, and to see that the rest of the holes were large enough so that we could get in with the forms, and I hadn't seen any of them that was excavated one foot out and at a 1 to 1 slope.

Q. Is this what you told Mr. Staples?

A. Yes; well, he says "Bill, we're just getting started here; give me a little time; I'll appreciate it if you'd have Fred help me check a few of these."

Q. That is Fred who? A. Fred Waltie.

Q. Your superintendent?

A. Concrete Construction superintendent, so we went down and checked a few of them. He says "Well, I'll try and get some fine graders in here to get these things on the button for you."

Q. Now, about how long were you there on the job at that time, Mr. Schaefer?

A. I don't remember just how long I was on the job and back [1170] to Portland and back on the job.

(Testimony of William E. Schaefer.)

Q. Well, do you remember approximately how long you were out there on April 15? Just that day, or did you stay longer?

A. No, I was there several days.

Q. And were you right on the job and out in the field during that time? A. Yes.

Q. What developed, if anything, with reference to the excavations being brought to grade?

A. Still off grade.

Q. Well, what did you do about it, then, from then on? A. Kept complaining to Mr. Staples.

Q. Well, then——

Mr. Holman: Again could you talk a little louder? We just don't get you here.

A. I kept on complaining to Mr. Staples.

Q. Then what did you do, Mr. Schaefer? Did you stay there or did you go someplace?

A. Stayed on the job several days, and then I went back to Portland.

Q. All right, and who did you see in Portland?

A. M. C. Schaefer, my brother.

Q. All right; now, you can't relate the conversation between you and your brother, Bill, but was anything done about arranging for a meeting then, on the field? [1171] A. Yes.

Q. And for what date?

A. I believe it was for the 28th of April.

Q. All right, then did you come back again to 1062? A. Yes.

Q. And who with? A. M. C. Schaefer.

Q. All right; now, just go ahead and tell what happened on the 28th of April.

(Testimony of William E. Schaefer.)

A. Well, we went to the job office expecting to meet Mr. Macri.

Q. Was he there?

A. He wasn't there on the 28th.

Q. All right: what did you do then, if anything?

A. So we wanted to see him while we were there, regarding the excavation, so Mr. Staples I believe called him, and he was on the job the 29th.

Q. And you met Macri the next day?

A. Yes.

Q. All right.

A. And we went out in the field, and again Fred Waltie, our superintendent, went down and he stretched a line and took measurements to show what was wrong with these excavations.

Q. Did Mr. Staples say where Mr. Macri was the 28th, and why he wasn't there, do you recall?

A. I believe he called him at Yakima.

Q. Did he state to you why Mr. Macri wasn't there the 28th, the day you first went to meet him? If he didn't, if you didn't hear what he said, why, just tell me.

A. I don't know, exactly.

Q. You don't remember Mr. Staples saying anything why Macri wasn't there on the 28th?

A. Well, he says he couldn't get hold of him up at Seattle; he had called Seattle and couldn't get hold of him.

Q. All right; the next day did Mr. Macri meet with you on the job? A. Yes.

Q. All right; state what you did, where you went, and what was said.

(Testimony of William E. Schaefer.)

A. Well, Fred Waltie checked, oh, about three or four of the excavations.

Q. Was that with you? A. Yes.

Q. And who was together there then?

A. M. C. Schaefer, Mr. Macri; and Mr. Staples, as we were checking, drove up on the job where we were. He come from another part of the job.

Mr. Holman: May I get this correct? You say Mr. Schaefer, Mr. Staples and Mr. Macri came up together, or was Mr. Schaefer with you? [1173]

A. Mr. Schaefer, Mr. Macri and I, we drove out in my car.

Mr. Holman: Oh yes, I see.

Q. All right, and who did you meet out there then?

A. Mr. Staples, he come from another part of the job. He took another road and come on out.

Q. All right; now, what did you do and what was said in Mr. Macri's presence and in Mr. Staples' presence?

A. We complained about the excavations.

Q. What did you say about them?

A. They were all dug vertical, none of them room enough to put in our forms, she-bolts or strongbacks, and the excavtion wasn't any part of Concrete Construction's contract; we wasn't to have anything to do with the excavating. Well, Mr. Macri said "The boys made a mistake; we will make them bigger."

Q. What did he say about the slope, if anything, of the banks?

(Testimony of William E. Schaefer.)

A. Well, he said they'd excavate them to slope so we could get the forms in and out, and my brother mentioned to him that it costs a lot of money to do that excavating, and it wasn't any part of our work, and he says "Why don't you take over the excavating, the fine grading?" and brother says "I don't want anything to do with it." He says "You take it and I'll pay for for it." Brother says "No, that's none of our work, and we don't want it; we've spent too much money on this now, trying to get started. [1174] If this keeps up, we'll tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, where otherwise we could take these panels to another structure without hauling them to the yard and hauling them back." He says "Don't worry about that. I'll pay all your costs and expenses on that; just let's get started and quit arguing about it."

Q. Is that the substance of the conversation as you remember it? A. Yes.

Q. Now, about how many excavations, or structures, I should say, did you check?

A. At that time?

Q. Yes.

A. I believe three or four.

Q. This was on the 29th of April?

A. 29th of April.

Q. All right; now, did you find anybody doing any hand excavating in any of those structures?

Q. That same day, on structure number 18, next

(Testimony of William E. Schaefer.)

to the road, Fred Waltie and Bob Schuler were excavating, and M. C. Schaefer pulled them off the excavation. He says "We're doing too much of this now."

Q. Were any of Macri's men there doing any excavating? A. I didn't see any. [1175]

Mr. Holman: Pardon me; Mr. Waltie and who?

A. Bob Schuler.

Q. Whose employee was Bob Schuler?

A. They were Concrete Construction Company employees.

Q. Did Mr. Macri say anything to Mr. Schaefer that day in your presence as to the amount of money the Concrete Construction Company would make on this job?

A. Yes, he did. He made the remark that nobody ever lost any money——

Mr. Hawkins: Your Honor, I object to that, and I don't see the materiality of it; certainly not binding on the defendants Goerig and Philp.

Mr. Holman: It is immaterial as far as the Macris are concerned.

The Court: Overruled; you may answer.

Witness: He said nobody ever lost any money on Macri's job, and we wasn't either; that we should make between eleven and twelve thousand dollars on this job.

Q. All right; now, do you know how long you stayed on the job this time you came up on the 28th of April?

A. I believe I went back to Portland.

(Testimony of William E. Schaefer.)

Q. Beg your pardon?

A. I believe I went back to Portland.

Q. Yes, but how soon? That is, you came up on April 28, then met the next day, the 29th. Now, do you know how [1176] long you stayed there after that?

A. I don't exactly know how long I stayed there, whether I went back that same day or the next day.

Q. Do you remember whether or not you checked any more excavations while you were on the job that trip?

A. Not that trip.

Q. Pardon?

A. Not that day.

Q. Well, not that day; that trip did you?

A. I believe the next time I checked excavations was about May 6.

Q. About May 6?

A. Yes.

Q. Were you back on the job again then?

A. Yes.

Q. And as I say, Mr. Schaefer, if it is necessary for you to refer for dates to your book, why, feel free to do so. What did you do with reference to checking excavations on that trip, and what did you find out, and see?

The Court: I'm not sure of that date.

Q. He said about May 6.

A. About May 6.

Q. Still in 1944.

A. That day there was no excavations ready, that is, the fine grading hadn't been done in them, ready for forms; [1177] no lumber to build panels with.

Q. Now, did you say anything to anybody about the excavations?

(Testimony of William E. Schaefer.)

A. Every time I seen George Staples I complained about the excavations, and that goes for Mr. Macri; every time I seen Mr. Macri I complained.

Q. Did Mr. Staples or Mr. Macri ever tell you that you had to make your complaints in writing?

A. No, he never told me that.

Q. Now, when you complained to Mr. Staples on this May 6, do you remember anything about what he said about it?

A. He said he didn't have men enough and not the type of men for fine grading; should have an engineer to do this fine grading and take it over, because he was setting stakes out ahead of the hoe, to do the rough grading, and trying to take care of the fine graders too. He said it was too much, he couldn't take care of it.

Q. What did you say, if anything?

A. What's that?

Q. What did you say back to him, if anything?

A. I said it was about time they were getting somebody to take care of it. If we was going to go right through this job and get through with it in a few months, why, they'd have to get more fine grading ahead of us.

Q. Now, how about the next time? When were you back on the job? [1178]

A. May 10.

Q. Did you again check the excavations?

A. Yes.

Q. How did you find them?

A. I had Fred Waltie check the structures, I believe from number 39 to 60, structure excavations.

(Testimony of William E. Schaefer.)

Q. How did you find them?

A. And that was the same day I took the pictures of these structures. The banks were vertical, the measurements showed there wasn't room enough for the forms without excavating from the bank to get in some of the forms, some of them were off center, not in line; I took the pictures and had them developed in Portland to show the office what was going on.

Q. Those are the pictures in evidence?

A. Yes, the pictures I identified.

Q. On this May 10, then—am I correct on that date?

A. Yes, you are.

Q. Did you complain to anybody, see Mr. Macri or his foreman, on that day?

A. I checked with Mr. Staples and told him what I was doing, told him I was taking pictures of them.

Q. And what was said between you and Mr. Staples, in substance, if you recall?

A. Well, he says, "Bill," he says, "I've seen you operate on [1179] other jobs," he says, "I hate to be holding you back like this," he says, "I know your outfit is a good operator, and I hate to be holding you back like this, but I can't get any cooperation with Macri."

Q. All right; now, when were you back on the job the next time?

A. That was on May 19.

Q. All right, who was with you on that day, if anybody?

A. I believe M. C. Schaefer.

Q. Now, what did you do and see that day?

(Testimony of William E. Schaefer.)

A. Pulled some of the men off and brought them back to Portland, on account of excavations.

Q. Did you examine the excavations?

A. Yes.

Q. And how did you find them?

A. The same as we checked them before; no improvement.

Q. And how many structure forms were then in place, if you know?

A. About 30 or 35, probably.

Q. Have you got a note that you made on it at the time?

A. No, I don't have a note on how many were ready.

Q. You do not have a note on how many was ready?

A. No; I believe about 30 or 35.

Q. Do you know how many days' pouring, or how many days' pouring would that many structures be, assuming that you [1180] brought up the equipment then that you had on the job later, consisting of your Mixomobile, and your Buggymobile and your trucks?

A. Probably about 2½ days.

Q. All right; now, were there any more holes or excavations that were ready with reference to the hand excavation on the floor for the installation of structure forms, that didn't have the forms already in them, on May 19, 1944?

A. No; there were some dug out with the hoe.

Q. Dug out with the what? A. Hoe.

Q. Dug out with a hoe?

(Testimony of William E. Schaefer.)

A. A hoe that they use for rough excavation.

Q. Well, did that leave the floor of the excavations ready to receive the forms? A. No.

Q. All right, then, what did you and your brother, Mr. Schaefer, do that day? First, was Mr. Staples or Mr. Macri there?

A. I don't remember whether Mr. Macri was there, but we talked to Mr. Staples.

Q. What did you say to him?

A. We told him we was going to pull the men off.

Q. Tell him why? A. Yes. [1181]

Q. What did you say?

A. Told him we was going to pull the men off to Portland until they got some excavations far enough ahead so we could come in and really set forms.

Q. Did you do that? A. Yes.

Q. Leave any men on the job at all?

A. Yes.

Q. Who? A. The yard crew.

Q. And who was that?

A. I believe it was John Klug and Mercelle and Monrad. I'm not sure about Mercelle, whether we pulled him back to Portland or left him on the job.

Q. All right; then how long did you stay back in Portland before you came back on the job?

A. I believe the next time I was up there was the time the men went back on the job. That was June 29.

Q. Now, your brother, Mr. Schaefer, related a conversation which took place on June 15, 1944. I

(Testimony of William E. Schaefer.)

understand you were not present at that conversation. A. That meeting with Macri?

Q. Yes. A. No, sir, I was not.

Q. All right; you were back, you think, on—what was that [1182] date, you say?

A. June 29.

Q. Do you have any record or any recollection of what took place that day, Mr. Schaefer?

A. I believe we checked the structure excavations.

Q. Were there any excavations made then?

A. Yes, the fine graders had been in quite a few of the excavations. I don't know just how many, but there was quite a few of them.

Q. Did you put your carpenters back on the job then? A. Yes.

Q. And when they went to work what did they find, if anything, with reference to the grade and alignment of the excavations?

A. The invert elevation was too high, they had to start excavating, fine grading, and excavating the vertical walls to get in their forms, strongbacks and she-bolts.

Q. How about the bank slope? What did you find in that regard?

A. The bank slope was vertical.

Q. What did you do or say about it?

A. We complained to Mr. Staples about it, and Mr. Macri; every time we seen Mr. Macri we complained about it.

Q. What would you say?

(Testimony of William E. Schaefer.)

A. Well, there was one time, I don't know just exactly what [1183] date it was, he told me he was going to get another superintendent that knew something about the job; he didn't think that George Staples was capable of handling it.

Q. Do you know who was the superintendent—do you know when Mr. Staples left the job?

A. No, I don't.

Q. Now, do you know when you were back on the job the next time, Mr. Schaefer?

A. I believe we went to pour concrete. I'll check here.

Q. Do you have the date that was?

A. July 29 we moved on the job to pour concrete.

Q. And when did you make your first pour?

A. That was July 31.

Q. Now, do you have any notes that indicate the number of structures that were ready for concrete pouring when you started your crew, your pouring crew?

A. No, I don't have the number of structures.

Q. Now, how long were you on the job, then, when you came up this July 29?

A. I believe about 10 days, two weeks, somewhere along in there.

Q. What was done at that time, if anything, with reference to your superintendents?

A. During that time Fred Waltie asked to be relieved, and I [1184] put Darcy on as superintendent.

(Testimony of William E. Schaefer.)

Q. Was that—that was what you did?

A. That's what I did.

Q. Were you back on the job after this time, off and on? A. Yes.

Q. And what was the situation, without detailing each one from then on, with reference to the excavation and fine grading and bank slope?

A. Still the same; had to excavate all the way through, and fine grade; the banks were vertical all the way through.

Q. Did you complain to anybody of Mr. Macri's force about it when you were on the job the rest of the way through?

A. Every time I seen Mr. Macri I complained to him. In fact, I complained to him—he was telling my brother I was belly-aching too much.

Mr. Holman: I submit what he was telling his brother should be stricken.

The Court: It will be stricken.

Q. Did you hear Mr. Macri tell your brother that? A. Yes.

Mr. Holman: I don't move, then, but I don't think he finished the answer.

A. I heard Mr. Macri complain to my brother that I was belly-aching too much about these excavations. I was right there. [1185]

Q. Now, were you around when there was any of the stripping being done? A. Yes.

Q. And what difficulties, if any, did your stripping crew run up against in removing forms?

A. They had to excavate to get the she-bolts out,

(Testimony of William E. Schaefer.)

and pry the forms out, and they wrecked them; every panel I ever seen moved out, removed from the concrete structure that was down in an excavation, needed repair.

Q. That's the outside panels?

A. That's the outside panels.

Q. What, if anything, did the clearance or lack of clearance between the outside panel and the bank have to do with that?

A. Well, the strongbacks were right up against the dirt bank. They had to excavate to get down in there and remove the she-bolts and strongbacks.

Q. Now, with reference to the type of lumber that was furnished on the job, and the timeliness of furnishing it, could you describe that?

The Court: Perhaps we had better not go into that; it is almost time for recess. We will resume this case at 9:30 tomorrow morning.

(Whereupon, the Court took a recess in this cause until Thursday, March 6, 1947, at 9:30 o'clock a.m.) [1186]

The Court: I assume that this arrangement, whatever it may be, for taking a deposition, the Court is not required to take any action on that, but I just wondered when that would be?

Mr. Holman: Well, I set it for the 8th, Saturday the 8th.

Mr. Olson: Counsel has served a notice on us to be in Boise, Idaho, at 1:30 Saturday afternoon.

Mr. Holman: Served last Friday.

Mr. Olson: Yes, but I've been here the same as counsel has. It is rather irregular, it seems to me, to take a deposition right during the course of trial that far away from home, no showing what the witness will testify to or the materiality of his testimony. It seems to me it is unreasonable to require counsel during the trial of the case to make a trip of that kind without some showing of what the man will testify to, and that it's in some way material. All of the Bureau officials are here that actually did any of this, the field inspectors are all here, counsel has produced them, the office force is here, and this is the man in charge, to whom the people report. Unless they can show that he knows something the other men don't know and can testify to, it seems to me it is unreasonable to require us to go to Boise to take this man's deposition. The man's been there for a long time; his deposition could have been taken prior to trial.

Mr. Holman: Well, of course, on that, your Honor, I have already advised the court that I had made the arrangements for Mr. Nelson to be here, subject to the approval of his superior, and his superior sent the telegram [1187] as I showed the Court, stating that he would not be available, but we could take his deposition, and I will be glad to file that telegram if your Honor desires.

Mr. Olson: Well, I don't contend that Mr. Nelson would come here to the trial, because he advised me a couple of weeks ago that he wouldn't attend the trial. I'll concede that he won't come voluntarily.

The Court: I think it is conceded by both of you that Mr. Nelson wouldn't be available, is that true?

Mr. Holman: Not here, your Honor.

The Court: The requirements of the rule are that notice, a reasonable notice, be given of the time and place of taking an oral deposition, or deposition on oral examination. I suppose what would be reasonable would depend upon the circumstances of the situation. If this trial were continued straight on it certainly would be unreasonable to ask counsel engaged in it to go from adjournment one night to Boise on the next morning, 400 miles.

Mr. Holman: I didn't intend that. When we served it on the 28th the trial had already gone on so protracted that I thought the time—last Friday when I advised him——

The Court: Well, it is unusual in itself to take a deposition during the trial.

Mr. Holman: That is correct, your Honor, but I'm [1188] also in that emergency for which I am not to blame.

The Court: It seems to me under the circumstances it wouldn't be unreasonable to inquire as to what it is proposed to elicit from this witness, and whether it is not possible to get it from some other witness who is available.

Mr. Holman: I wish, as part of our case, your Honor, I've detailed this somewhat in the record before, but I wish as part of our case to have the engineer in charge present or his deposition taken for the purpose of showing the duties of the field men of the Bureau in connection with Macri's 13,

sub-numbers 13-a to 13-o, inspectors' reports, which are in evidence; with respect to whether the matter of the interpretation of the plans by the engineer in charge, your Honor will recall that the specifications say the engineer in charge, I think is the wording in the specification, or substantially that, contracting engineer, I think is the term——

The Court: Contracting officer?

Mr. Holman: Yes, thank you.

The Court: Was Mr. Nelson the contracting officer?

Mr. Holman: He was the contracting officer in charge; I wish to have Mr. Nelson also testify factually with respect to conversations had with Mr. Darcy with respect to the lack of progress of the Concrete Construction [1189] Company, by him as engineer communicated to Mr. Darcy. That information I cannot get from official records, and I wish also to have Mr. Nelson explain the manner of computation and the assignment by him for computation for payment of quantities; the explanation as to penalties, which is not yet before your Honor, since only the final estimates have been put in evidence yet, your Honor, but the determination of penalties invoked on both 1062 and 1068, and as the contracting officer he would be the one who would invoke those penalties, so he becomes a very important witness for Macri and Company, and I endeavored my best to comply with the rule; I endeavored first to have Mr. Nelson here. I went there before trial and talked with Mr. Nelson, and regardless of what counsel says, Mr. Nelson did not

give me any such statement that he would not be here, and he stated he would be here unless he 'phoned me or I heard from his superior, and I heard from his superior that he would not be here, and immediately communicated that to the Court, so it is not any hit and miss procedure or anything collateral. We are serious. I'm giving them plenty of notice, and they have not complied with the rules with respect to striking the deposition, unless your Honor holds it is not a reasonable time. If your Honor does, naturally I'll call the deposition off.

Mr. Olson: If your Honor please, there is in evidence, which we have permitted to go in, a letter from Mr. Nelson over his signature which gives his interpretation as to the one to one slope and the neat lines and the foot out from the foundation. That's in evidence. Maybe it wouldn't have been admissible, but I consented to it going in, so that letter is in. That would eliminate that part of it. Counsel says he wants to interrogate Mr. Nelson as to the specifications 1062, with reference to the interpretation by the contracting officer. I assume he is referring to that part of the specifications relating to the excavations where it says except in certain instances as laid out by the contracting officer as to progress, or something. If I understand counsel correctly, that's what he was referring to. It's been shown already that all of those provisions have no application in this case, because each and every structure was figured on a one to one slope and one foot out, by the actual man that figured the payment in his office. I've shown that those general specifi-

cations never came up on this project, because it was never shown that there was any of this vertical rock excavation, or that they run into excavations where they had to consult the contracting officer and vary the one to one slope and the one foot out for payment. Now, the matter of what directions Mr. Nelson gave the field men, or what their duties were, your Honor, is wholly immaterial in the first place, and in the second place the men themselves can testify and have testified to what their duties are. Now, what Mr. Nelson would say, and the only thing he could say, is what he might have told them, which is not controlling here. The question is what they did, and the field men themselves have all been here and testified to what they did. Mr. Nelson can't add a thing to that. The only thing that leaves is a conversation between Pat Darcy and Mr. Nelson. Well, the fact that he testified to a conversation that he had doesn't prove anything unless he's showing that Mr. Darcy admitted we were laying down on the job, and counsel hasn't said that's what he's going to show, and there is also in evidence, I believe, sure there is, from the Reclamation address to Macri and Company on that very subject, a letter, a copy of which was sent to the Concrete Construction Company as shown by the letter itself, and the letter is not complaining about the Concrete Construction Company being slow, but he's complaining about the job being slow. Your Honor, I don't see where the materiality of Mr. Nelson's testimony is shown, or what it will add to it, and I at this time move that the notice for taking the deposition be stricken on

the ground that it is not reasonable notice given us, and on the [1192] further ground that it is not shown Mr. Nelson is a material witness.

Mr. Holman: May I state this? I don't, your Honor, I don't want to extend it at all. The Court will recall that on the second day of the trial, with your Honor's permission and counsel's acquiescence, I called in the various government men for the purpose of their preliminary identification of the various government records, and some of those are now in evidence, to be substituted by copies. Others have not been. I called in the officer in charge, Mr. Harold Pease, for that general identification, and that was done with the purpose that Mr. Nelson then would have those here for the purpose of his explanations to the Court with respect to using them, as the chief officer on this work, as part of the defendants' case. Now, there is one angle to this, your Honor, that counsel has not mentioned, with respect to 1068 and also with respect to 1062, as to the relationships between the principal contractor and the government and communications between them. The defendant Macri is entitled both as against their claim for breach of contract and as affecting Philp and Goerig to have explanations by that commanding officer—not commanding officer, officer in charge, surrounding those communications.

The Court: It seems to me that your position would be better as to whether or not you had given reasonable notice if you had taken the Court into your confidence and had taken up this matter of taking the deposition on next Saturday. I didn't

know until I learned it rather inadvertently that you had given oral notice of taking the deposition.

Mr. Holman: I gave no oral notice; I gave written notice.

The Court: Yes, I mis-spoke. I meant that you gave written notice of taking the oral examination.

Mr. Holman: Yes, and I immediately communicated with the Clerk, and was advised to keep that.

The Court: That's the last I heard of it, until a day or two ago.

Mr. Holman: I understood from your Honor that it wasn't reported to your Honor, and was to be proceeded under the rules. If your Honor feels I should have communicated with you, I'll call the deposition off, and there was no intention to keep anything from the Court. I understood it was to be a matter between me and the Clerk.

The Court: What I had in mind was that if you wanted me to pass upon the reasonableness of your notice, and of course the rule provides the notice must be reasonable, I would be in a better position to do it. If I [1194] hadn't adopted the plan of letting the people in this next case come in, we would be running this case right up to Friday afternoon, and then it would be utterly impossible or impractical to go to Boise.

Mr. Holman: It certainly was a matter that we would not pursue. I would have had to make a rearrangement. Your Honor will recall I immediately called it to your attention by that telegram, and I have tried my level best to do exactly the proper

thing under the existing circumstances. If your Honor feels I should have notified you instead of the Clerk with respect to the notice served, I right now in open court waive the deposition, your Honor.

The Court: The thing I want to do here is to get all the pertinent evidence that I can that might be of aid in deciding the issues in this case. However, I don't want to be unfair to either litigant in the matter of taking depositions a long distance. I think if you want to take your deposition on Saturday we'll not hold Court on Friday in this case. Can you take it in one day?

Mr. Holman: Oh, I think so. Counsel and I have had experience before. It worked reasonably well.

The Court: It seems to me your deposition took a good many days before. [1195]

Mr. Olson: It went pretty slow, your Honor. There wasn't anybody there to rule on objections. We got through, but it was so late our car was locked in. We have to get back from Boise, Idaho, too.

The Court: It's about 400 miles, isn't it?

Mr. Olson: That's what I understand, and I've made some inquiry as to the mode of getting there, and apparently it is not good. If you go to the Union Pacific you take some—I've forgotten what they call it, from here to Wallula, and maybe you make connections to get to Boise on the Union Pacific and maybe you don't. It just doesn't seem to me that it is reasonable to require us to do this. They've got an engineer in charge right here, right worked on the job were available.

The Court: Well, this man Nelson is the engineer who was in charge at the time these contracts were executed, isn't that true?

Mr. Holman: That's correct, your Honor, and may I say this, may it please the Court, that I would prefer not to take the deposition than to have your Honor feel that I was taking the least advantage of any counsel in the case, or of the situation. I'll take my chance without the deposition before I have your Honor feel that way. [1196]

The Court: I didn't intimate you were taking advantage, Mr. Holman. I know you didn't get word that the witness wouldn't be available until the trial started.

Mr. Holman: I'm just in a tough spot, and trying to do my best.

The Court: I think, however, if you wish to take the deposition you should pay counsel's expense down there and back, as a condition to taking it.

Mr. Holman: That is, the plaintiff's counsel?

The Court: Yes, I mean plaintiff's counsel.

Mr. Holman: I'll furnish his transportation.

The Court: I think that those terms are not unreasonable.

Mr. Holman: You say his expenses, your Honor. You mean transportation, subsistence, hotel, or his transportation?

The Court: I mean his transportation and subsistence while he was there, at, shall we say, the Federal rate?

Mr. Holman: No, I don't insist on the Federal rate. I'll leave it to counsel's mercy.

The Court: I think you gentlemen can get together as to what his actual expenses are. That's what I had in mind. I think that is a reasonable condition to make, if you wish to take a deposition at this time, in the middle [1197] of the trial, and that means his actual expenses on the train and his subsistence while he is there. What time did you set it?

Mr. Holman: I set it, your Honor, knowing the difficulty of travel from Yakima to Boise, I set it for 1:30 Saturday, the 8th, which will allow counsel and me to go by train on the evening of the 7th, Friday the 7th, or earlier if counsel wishes to travel more leisurely, and will allow a return by train on Sunday, the 9th, unless we could get through. The train leaves there at 3:30 in the afternoon, so it is unreasonable to expect to get back on that train.

The Court: That doesn't leave you very much time to take the deposition. Of course, you could go, I presume, until you finish on Saturday night.

Mr. Holman: And it is set at the Bureau office, which is some three miles out, so counsel will have a taxi fare.

Mr. Olson: How are we going to get back here by Monday morning? I know, I did find out this, that you get up off of your sleeper down here at Wallula I think at 2:30 in the morning.

Mr. Holman: 4 o'clock.

Mr. Olson: They told me 2:30, and then you sit up.

Mr. Holman: It is not pleasant, it is not comfortable, [1198] and I know, because I just took it.

The Court: Well, I wonder if it wouldn't be advisable, then, I hadn't intended to have any hearing in this case on Friday anyway, that's day after tomorrow, isn't it——

Mr. Holman: I don't know whether I could advance the hearing to Friday. I had the arrangements made for Saturday. I don't know whether I could get the Court reporter and notary public for Friday.

The Court: Well, that might be difficult. I wonder if it wouldn't be wise to not reconvene this case until Tuesday morning?

Mr. Holman: I think that would be very much better.

Mr. Hawkins: That's agreeable. I wonder if it might be understood——

The Court: Just a moment.

Mr. Olson: That's a little bit difficult. I've had this difficulty throughout the trial, as your Honor knows; I've been having witnesses here, I got two men off the job yesterday afternoon, thinking it was a cinch to go on. Frankly, I'm getting quite close to the end of my case. I do have some expert witnesses, one from Portland, who is here now.

The Court: Well, we have tomorrow forenoon, of course, in this case, a two and a half hour session. You [1199] have one witness in addition to finishing with William Schaefer, is that what you meant?

Mr. Olson: Well, I have Mr. William Schaefer to finish with, and then I have this expert witness, which will take some time, and our accountant, of course, and then Mr. Schaefer, M. C., on the question of damages.

The Court: Well, we'll have tomorrow forenoon, two and a half hours, and——

Mr. Olson: Well, I'd rather, your Honor, start in Monday morning. Perhaps we can get a ride on an airplane back, or something.

The Court: Well, we'll start at 10 o'clock Monday morning, then, anyway, and give you a half an hour more.

Mr. Hawkins: Your Honor, I wonder if we might have the understanding, I'm not planning to go to Idaho on this deposition, that any questions asked there are subject to objection when the deposition returns here?

Mr. Holman: I think that would be only fair, your Honor.

The Court: I think that perhaps the deposition should be subject to objection, with the exception I don't think we should apply objections too closely to the form, or whether it is leading, but as to materiality I think they would be subject to objection.

Mr. Hawkins: Pursuant to our previous understanding, [1200] I wonder if I might withdraw this file of DePuis and Ferguson? It's been in the hands of the clerk four or five days, a copy of the file is in the clerk's hands——

Mr. Holman: Is the copy of the assignment yet delivered?

Mr. Hawkins: Yes, the copy of the assignment is in the hands of the Clerk. That's no part of this file at all. This is the claim of Maceri and Company against the government, and a true copy of that claim is also in the hands of the clerk.

Mr. Olson: I understand, counsel, that you have substituted a complete copy of all the documents that are in this file, that you wish to withdraw?

The Court: What you had in the first place were copies, and you've substituted copies for the file; is there any objection?

Mr. Holman: No, your Honor. That was the understanding.

The Court: All right, it may be taken out. The court will recess in this case until tomorrow morning at 9:30.

(Whereupon, the Court took a recess in this cause until Thursday, March 6, 1947, at 9:30 o'clock a.m.) [1201]

Yakima, Washington Thursday, March 6, 1947
9:30 o'Clock A.M.

(All parties present as before, and the trial was resumed.) [1202]

WILLIAM E. SCHAEFER

Direct Examination
(Continued)

By Mr. Olson:

(Whereupon, the reporter read the last question on March 5, as follows: "Now, with reference to the type of lumber that was furnished on the job, and the timeliness of furnishing it, could you describe that?")

Q. All right, will you answer that question, Mr. Schaefer?

(Testimony of William E. Schaefer.)

A. I did see one pile there of second-hand lumber, about the time we come back to set structures, I know.

Q. Speak up a little louder.

A. I did see a pile of second-hand lumber at the yard the time we was back to set structures again; that's after we pulled off of the job.

Q. Have you examined the lumber we have in court here, which is plaintiff's Exhibit 29?

A. Yes.

Q. Is that the type of lumber that you refer as the second-hand lumber that you saw?

A. Yes, that's part of the pile I saw.

Q. And how does this lumber here compare with the general run of the load or pile of second-hand lumber that you saw? [1203]

A. From what I seen there, that there is an average, I would say it was a fair average of the pile.

Q. Now, did you see any other lumber other than this pile that you can describe, as to quality?

A. At different times I seen lumber that was considerable better than that.

Q. And was the rest of the lumber that you saw, outside of this pile, suitable and adaptable to the job, or what was its condition?

A. It wasn't suitable.

Q. And in what respect?

A. It was too wet, and a lot of it was knotty, large knots in it; some of it was kind of cracked up, after it laid on the pile the sun dried it out. It was warped and cracked.

(Testimony of William E. Schaefer.)

Q. It was warped, you say.

A. Warped and cracked.

Q. Now, what did you have to do, if anything, about the knot holes?

A. Patch them up with tin.

Q. Why was it necessary to do that?

A. In order to have enough lumber to keep going.

Q. Now, with reference to whether or not the lumber—that is, whether or not the lumber was available as you needed it, will you describe what the situation was in that [1204] regard?

A. Our superintendent kept complaining to the office——

Mr. Holman: I submit that this is hearsay.

The Court: Yes, that will be stricken, what the superintendent said, unless it was in your presence or the presence of the defendant, one of them.

Q. My question first was what was the situation with reference to the lumber being available as needed, as to what you know of your own knowledge?

A. It wasn't available, that is, on the job at all times.

Q. Now, did you hear any complaints made by your superintendent to Mr. Macri or to Mr. Macri's superintendent concerning the shortage of lumber?

A. Yes.

Q. And state the nature?

Mr. Holman: Just a minute. Your Honor, I would like to know when and where and in whose presence.

(Testimony of William E. Schaefer.)

The Court: As nearly as you can fix them. I think that is reasonable.

Q. Can you fix any times, Mr. Schaefer, or not?

A. Well, I was on the job on and off, but I was there an evening when our superintendent complained to Macri's superintendent about getting lumber in——

Mr. Holman: Which superintendent?

A. Macri's superintendent. [1205]

Mr. Holman: Which one?

A. Macri, or Ashley; I believe I heard him complain to both of them.

Mr. Holman: Was it Ashley?

A. I believe it was.

The Court: Go ahead with the examination.

Q. Now, do you know, Mr. Schaefer, whether or not the lumber would be furnished promptly after the complaint was put in? Do you know, other than what somebody may have told you?

A. Only from what our superintendent told me.

Q. Beg pardon?

A. Just from what our superintendent told me.

Q. All right. Now, there's been some pictures introduced of the Mixomobile, showing the elevated tower, Mr. Schaefer. Do you know about the removal of that tower? A. Yes.

Q. And can you tell about how soon after the job started that the tower was removed?

A. We started to pour the 29th of July, I believe, and the tower was removed the 16th day of August.

(Testimony of William E. Schaefer.)

Q. Now, Mr. Schaefer, showing you pictures 35 and 36 of plaintiff's Exhibit 49, and drawing your attention to the long chute that is shown in the picture, state what is the situation with reference to whether or not the length [1206] of that chute is adjustable? A. Yes, it is.

Q. And can you describe somewhat to the court just how that operates?

A. I believe the main part of the chute, I ordered it and had it made to my specifications, was about 10 feet long, with two 30 inch extensions, so that you could adjust it at the structure, pour in one side of the structure, or raise up your hopper and pour in the other side, so you would have different various lengths to work from.

Q. Can you state the limits of adjustment of that chute, then?

A. It would be about 5 foot adjustment.

Q. Was there any other adjustment on that chute, a slide adjustment of any kind?

A. This chute here, I think the joints broke, the adjustments.

Mr. Holman: May I have that answer, please?

(Whereupon, the reporter read the last previous answer.)

Q. Now, Mr. Schaefer, when the contract was entered into on 1062 between Mr. Macri and Schaefer, referring to the sub-contract, was there any conversation in your presence as to, or at about that time, in which Mr. Macri made any statements

(Testimony of William E. Schaefer.)

about the availability of lumber, or [1207] his ability to furnish lumber, that you heard? A. Yes.

Q. And would you relate the conversation and state for Mr. Holman's benefit the approximate time and as near as you can who was there?

Mr. Holman: That's right, I'm entitled to that.

A. I don't know the exact date, but I would say it was around March 8, or 9, along in there.

Q. Now, about who was there, Mr. Schaefer?

A. Mr. Macri, M. C. Schaefer, and myself.

Q. Now, would you state what Mr. Macri said, if anything, about his ability to furnish lumber, both as to quality and timeliness, for this job?

A. He said that he had an interest in a lumber mill, and that he'd furnish the lumber, and as far as lumber, we wouldn't have to worry about it, he'd get plenty of it.

Q. Now, did Mr. Macri make any statements in your presence as to the length of time within which you would be able to complete this job, as far as their operations were concerned?

A. Yes, that was discussed that time.

Q. And about when?

A. About March 8 or 9.

Q. Is that the same time as the lumber?

A. Same time. [1208]

Q. Same persons present? A. Yes.

Q. And what did he say in that regard?

A. Well, he says that he had plenty of equipment to keep ahead of us. M. C. Schaefer asked him about when he expected to get through with

(Testimony of William E. Schaefer.)

that. Well, he says "We can work ahead of you as fast as you want" and he says "If one shovel ain't enough, we'll put on another one." He says "In fact, if you fellows need some equipment, we can let you have some; we've got plenty of equipment."

Q. Was anything said by Mr. Macri in your presence about the availability of roads?

A. Yes.

Q. And can you state about when that was?

A. That was the—I believe it was about the latter part of March.

Q. In whose presence?

A. Mr. Nelson, of the Bureau of Reclamation.

Mr. Holman: 1944?

A. 1944.

Q. In whose presence, Mr. Schaefer?

A. Mr. Nelson, of the Bureau of Reclamation.

Q. Who else?

A. M. C. Schaefer, and myself, and Mr. Macri.

Q. And what did Mr. Macri state? [1209]

A. I asked him about the roads. It was at the time we was looking at 1068. We went down through the project, and coming back I asked Mr. Macri about these roads. I said "What are we going to do about them, to get in the field, pretty bad down here." He says "That will be the same as the other job. We've got to get in here to do our work, and we'll see that you fellows can get in to them."

Q. Now, in these other jobs, or in the work

(Testimony of William E. Schaefer.)

which the Concrete Construction Company had been doing, Mr. Schaefer, particularly its concrete work, was there any concrete work on these other jobs a part of which was similar to the structure or box type of concrete work that you were performing on 1062? A. Yes, somewhat similar.

Q. In what regard, and what parts of it?

A. Well, it was manholes, catch basins, inlets, on airport work, and then there was pump houses at Sauvie's Island there in Portland.

Mr. Holman: Your Honor, the witness just doesn't talk loud enough for us to hear him.

A. Manholes, catch basins, inlets, on airport work; pump houses, pumping stations at Sauvie's Island, Portland.

Q. Now, was that work that you just described done before or after this job?

A. Previous to this job. [1210]

Q. Previous to 1062?

A. That is, some of it, and some of it during this job.

Q. Now, while you were performing this 1062, was there ever anything said about getting started on 1068, in your presence or by you?

A. Not to me.

Q. Did you say anything to Mr. Macri about it, or his superintendents make any inquiry about it?

A. No, I didn't, myself.

Mr. Olson: You may examine.

(Testimony of William E. Schaefer.)

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, you were general superintendent of all of the Concrete Construction Company operations? A. Yes, sir.

Q. And you had general charge of their over-all operations? A. Yes.

Q. Now, in those operations, 1062 along with these other things that you detailed at the last of your direct testimony were under your supervision, right? A. Yes.

Q. And was your salary apportioned to the various jobs consistent with the amounts of time you spent on those jobs?

A. My salary is by the week.

Q. Yes; was it apportioned to the jobs? [1211]

A. That segregation was made in the office, and how they made it, I don't know.

Q. What was your salary per week?

A. \$100.00 per week.

Q. \$100.00 a week. Now, isn't it a fact that after, as you say, you pulled your crew off, you put yourself on salary for this job at \$100.00 a week, correct? A. I didn't put myself on there.

Q. You were put on there, were you not, sir?

A. Sir?

Q. You were put on, were you not, at \$100.00 a week? A. I was put on.

Mr. Olson: Put on what?

Mr. Holman: On this job.

Mr. Olson: When?

(Testimony of William E. Schaefer.)

Mr. Holman: I've just asked him, after he pulled his crew off.

The Court: Well, proceed with the examination.

Cross-Examination

(Continued)

By Mr. Holman:

Q. I'll ask you if it is not a fact that for the week of July 27 to August 3, 1944, you were put on as superintendent at \$100.00?

A. I don't remember when that——

Q. And for the week August 3, to August 9 at \$100.00; correct or not? [1212]

A. I was getting a \$100.00 a week.

Q. Then the following week, August 10 to August 16, you were not on the payroll. Why?

A. I don't know why they didn't put me on the payroll.

Q. It is a fact, is it not, that you as general superintendent of all of the Schaefer operations was the superior to all of the different job managers? A. Yes.

Q. Yes; and you were the one who selected or designated the job managers, were you not?

A. Between M. C. Schaefer and myself.

Q. Yes, but you were the operating head, weren't you? A. Yes.

Q. Field head, I mean.

A. I consulted M. C. Schaefer.

Q. And you selected the men that you thought were the right men? A. That's right.

(Testimony of William E. Schaefer.)

Q. Now, I'm going to ask you with reference to the certified payroll deposited here by the government, as Macri's identification 16, will you please refer to the week of July 20 to the 26th; strike that—when did you say your crew came back on? A. To set forms?

Q. Yes, sir; came back on the job after you pulled it off? [1213]

Q. I believe it was May 29. I'll check that.

Q. All right, sir, will you refer to the week of May 25 to May 31—I mean in the payroll; you need your book?

A. I'm checking my date on when they came back on the job.

Q. I see; pardon me.

A. That was June 29.

Q. Yes, sir; June what? A. 29th.

Q. Yes, sir. Now, that was the time that you had your crew come back to go to work, correct?

A. That's right.

Q. Will you refer to the week of June 29 to July 5, which includes the holiday, July 4, and tell me if you appear there as superintendent, or if there is any superintendent shown? You're familiar with those payrolls, aren't you, Mr. Schaefer?

A. I haven't seen these payrolls much outside of just taking a glance at them. Don't they run in sequence here?

A. Yes, they're supposed to run right straight on down from the start; the week of June 29, July 5.

(Testimony of William E. Schaefer.)

Mr. Olson: Your Honor, it doesn't appear to me that it is proper to cross-examine this witness as to a payroll that he had nothing to do with making out, not made under his supervision, not gone into on direct examination; it is obviously a situation of Mr. Schaefer [1214] going through the payroll and telling counsel something that he knows nothing about.

Mr. Holman: That's not my purpose.

The Court: What is your purpose?

Mr. Holman: My purpose is examining his part of the participation in this job.

The Court: But he had nothing to do with the making of this payroll.

Mr. Holman: I don't know why not, sir; he's general superintendent.

The Court: Isn't this Maeri's payroll?

Mr. Holman: No, sir, it is Schaefer's payroll.

Witness: I don't make out the payroll.

Q. It is made out under your direction, isn't it?

A. No, sir.

Q. Whose direction is it made out under?

A. M. C. Schaefer, and the bookkeeper. I don't keep any books there.

The Court: I think you might take this payroll here and ask him about definite items.

Mr. Holman: Your Honor, I'm astounded that he can't pick it up. Let me have it.

The Court: We've spent altogether too much time in this trial fumbling around documents and exhibits anyway, it seems to me. [1215]

(Testimony of William E. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. The week ending July 5 on that payroll you do not appear, do you? It shows Fred Waltie, John Klugg, Darcy, Monrad and Mercille, correct?

A. Did you ask me if there was a superintendent appeared on this job?

Q. I asked first if you appeared.

A. I did not.

Q. And is there a superintendent shown?

A. Fred Waltie.

Q. Will you look at it, please? Isn't that carpenter foreman?

A. That's what it says on the payroll. He's still my superintendent on that job.

Q. He's certified to the government as a carpenter foreman, isn't he?

A. I can't help that. He was my superintendent on the job.

The Court: It seems to me that this examination should be, if you want to refer to something in here, then ask him if that is or is not a fact, according to his recollection.

Mr. Holman: That's right, sir.

The Court: It doesn't seem to me it is proper to have him tell you some part of something that is not in evidence, that he has nothing to do with making, and knows [1216] nothing about.

Mr. Holman: The point right there is that the

(Testimony of William E. Schaefer.)

payroll indicates Waltie as carpenter foreman, to the government, and he says and they've said that he was the superintendent.

The Court: I still don't see how it is proper, if he had nothing to do with making the payroll. Is this their payroll?

Mr. Holman: Yes, your Honor, Exhibit 16 is a certified transcript of payroll.

The Court: Which Schaefer furnished to Macri?

Mr. Holman: No, which Schaefer furnished to the government. This is the government's certified copy.

The Court: Well, go ahead.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Then for the next week of July 12—I'll be very brief on this, your Honor—the same general crew, and you were not there? There was a crew of seven at that time, was there not? A. Yes.

Q. All right, sir; then will you take the following week of July 19, and it is the same, is it not, sir? A. There's eight there.

Q. But you're not there? A. That's right.

Q. And there is no superintendent indicated. For the week of July 20 to July 26 that is the same, is it not, but you had twelve men that time, did you not? A. Yes.

Q. All right, sir. Then for the week of July 27 you are listed, are you not? A. Right here.

(Testimony of William E. Schaefer.)

Q. Yes, sir, as superintendent at \$100.00 a week, correct? A. That's right.

Q. All right, sir; now, the next week, for the week of August 9, ending August 9, you're again listed at \$100.00 a week, are you not, as superintendent? A. That's right.

Q. Yes, sir; then for the next week, the week of August 16, you're not listed, are you?

A. Yes, sir.

Q. Where?

A. Right down here, at \$100.00.

Q. All right, \$100.00 there. Thank you. Then the week of August 23 are you listed?

A. Yes, sir.

Q. All right, \$100.00? A. Yes, sir.

Q. All right, sir; and then the week of August 30 you're listed at \$100.00, are you not, sir? [1218]

A. Yes, sir.

Q. All right. Now, we'll get to the next one, September 6, you are not listed, are you, sir?

A. No.

Q. All right; now, for the week of August 16, and back to the last part of July, your crews had swelled from about 12 to 21, hadn't they, about 20 or 21? A. Yes, sir.

Q. Now, will you take the next week, please, still a large crew, Mr. Schaefer, the week of September 13, you're not listed, are you, sir?

A. No, sir.

Q. And isn't it a fact that after that you were not listed as superintendent on this job?

(Testimony of William E. Schaefer.)

A. Only when I was on the job, I imagine. I was on and off the job, sometimes for two or three days. How they segregated my time I don't know.

Q. Now, until July 4 Mr. Darcy had been operating under you in the Portland area? A. Yes.

Q. And you sent him up then to replace Waltie, did you not?

A. That was before July 4 that he took Waltie's place.

Q. Yes, June 29 to July 5, that week.

A. I think that was June 10, 9th or 10th; I can find out right here. [1219]

Q. Right here in the payroll you see both Mr. Waltie on for part of the week, don't you, and Mr. Darcy on for the rest of the week, the week of July 5? A. I see that.

Q. And you see it is sworn to as correct, do you not?

A. That doesn't indicate that the change was made at that date.

Q. All right, sir.

A. It may be right; I'll look in my notes.

Q. There is the week ahead, Mr. Schaefer, if you want to look at it. No Darcy.

A. About August 10.

Q. Sir? A. About August 10.

Q. That Darcy went on? A. Yes.

Q. Well, then, please, will you explain how, if he went on the job on August 10, how he's on the payroll for the week ending July 5? He's there, isn't he, P. L. Darcy? A. Uh.huh.

(Testimony of William E. Schaefer.)

Q. And he's shown three days, isn't he? Two days on the job and then three days off and one day on? A. Yes.

Q. All right, sir, and the next week he's shown, is he not? A. Uh huh. [1220]

Q. For the full week? A. Yes.

Q. And then still in July he's shown, is he not, for the next week, the full week?

A. Yes; so was Waltie.

Q. Yes, sir; I'm talking about Darcy, now. You say August when, was when he went off?

A. Right around August 10.

Q. And then the week of August 2 is the same, they're both there? A. Uh huh.

Q. And the week of August 9 is the end of Waltie's time, is it not? No, it doesn't show there.

The Court: I think you had better speak up, Mr. Holman.

Q. The week of August 16 shows Mr. Waltie still there, does it not, sir, as carpenter foreman?

A. Yes.

Q. Top man, first man? A. Yes.

Q. Wages fixed at the top; now, the week of August 23 shows Mr. Darcy replacing Mr. Waltie, does it not? A. Yes.

Q. Now, what is your explanation for your going on the payroll as superintendent, if you say Darcy was superintendent? [1221] Why was this payroll carried double that way, if there were two superintendents?

A. Darcy is superintendent, and I'm general superintendent.

(Testimony of William E. Schaefer.)

Q. Yes, sir; but didn't you in detailing your direct examination, Mr. Schaefer, endeavor to the best of your ability to set forth the times that you visited the job to indicate to counsel the times that you stayed on the job for any period, correct?

A. In my note-book——

Q. Yes, sir; and the time you indicated there as staying for several days was April 15, 1944, was it not, sir? A. April 15.

Q. Yes, sir; that's when you told counsel you were there for several days, and then—have you got that yet, sir?

A. Yes, that's correct.

Q. You were there for several days but you're not on the payroll for several days at that time, are you, sir?

A. I believe that's what we looked at there.

Q. In April?

A. I don't know whether I'm on the payroll for that day or not, because I didn't make it out.

Q. All right; now, the next time you answered counsel that you were on for several days; you said about 10 days or two weeks, was July 29, 1944?

A. Correct, yes, sir. [1222]

Q. And at the time you answered counsel you knew you were on that payroll at that rate for that period, did you not, sir? A. Yes.

Q. I see. Now, is it or is it not a fact that you sent Darcy up there, Mr. Darcy up there, to pre-gauge this job for a report to you?

(Testimony of William E. Schaefer.)

A. He sent his reports, his daily reports, into the office. I looked at them.

Q. While Waltie was there?

A. After Darcy took over.

Q. Sir?

A. After Darcy took over he made them out.

Q. I'm talking from June up to the time Darcy took over in August; Darcy didn't put reports in, did he?

A. No, Waltie reported to the office, with a daily report, every day.

Q. Then the reason that you put Darcy on was that he was a Portland man and you had gone over this job with him before he came up?

A. I didn't.

Q. You had not, sir? A. No.

Q. You told your counsel, according to my notes, Mr. Schaefer, that when you were up on that job, this is what my notes [1223] show you say: "They wrecked every panel I seen removed, every outside panel needed repair, strongbacks right up against the bank, had to be excavated to remove them and the she-bolts"; do you remember that testimony?

A. Yes, I do.

Q. How many panels did you see removed?

A. I seen panels removed on different occasions there.

Q. Well, give me the laterals, will you?

A. How many panels or structures?

Q. No, on what laterals?

A. On laterals 59.3.

(Testimony of William E. Schaefer.)

Q. What structures did you see panels removed?

Mr. Olson: If you can say.

Q. Oh, just a minute, counsel.

A. I believe between 1 and 18.

Q. Between 1 and 18? And when?

A. I don't remember the date.

Q. Well, what month?

A. I didn't mark it down when they stripped that.

Q. You can't tell me whether it was August, September, October, or November?

A. No, I can't tell you the date.

Q. Sir? A. I don't know the date.

Q. Or was it during the freezing weather? Were you up there [1224] during the freezing weather?

A. No, I wasn't.

Q. You didn't go up at all during the freezing weather?

A. I didn't, but M. C. Schaefer did.

Q. I'm asking you, sir. A. No.

Q. You didn't go there during the cold weather at all? A. No, I didn't.

Q. Were you apprised of the fact that the cement had to be heated, government requirement that the cement be heated from inside the forms after it was poured?

A. I don't believe we heated any concrete up there.

Q. You don't think you did, sir?

A. No.

Q. Would you say positively you didn't, sir?

(Testimony of William E. Schaefer.)

A. Outside of being a flare on the outside of the structure.

Q. That's just what I asked you.

A. I knew they did that.

Q. And you saw them do that? A. No.

Q. You never saw that. Did you help remove the form yourself? A. I watched them.

Q. You didn't help? A. No. [1225]

Q. All right, sir. Can you tell me anything about the sides of the forms, whether they were clean or not, the forms that were removed, the outside forms; were they clean, or not?

A. Fairly clean.

Q. And were they aged and warped and weather-affected, or not?

A. Some of these forms were, and they had small strips in the cracks.

Q. Isn't it a fact, Mr. Schaefer, to your definite knowledge, that those forms had been in for months and months and months before concrete was poured?

A. I know they were in for quite a long time, but I didn't know they were in that many months; months and months and months; I didn't know they were in that long.

Q. Mr. Schaefer, you as the general superintendent had charge, did you not, of lining out this job from the sub-contractor's viewpoint?

A. My duty was to see that the superintendents had plans, equipment, and also try, and I did, secure man power for them.

(Testimony of William E. Schaefer.)

Q. Yes. Now, I move that be stricken, your Honor. That isn't what I asked you; what I asked you is if you had charge of lining out the job.

The Court: Well, I don't know just what lining out [1226] means. I don't know whether his answer is responsive or not.

Q. Do you know what I mean by "lining out" a job? A. I know exactly what I did.

Q. What does that mean?

A. That means line your superintendents out to that respective job.

Q. It means plan your job? A. Yes.

Q. Mr. Schaefer, you personally made out no requisitions for lumber? A. No.

Q. You personally figured no quantity of lumber required for performance of the sub-contract?

A. No.

Q. You personally made no designation as to quality of lumber to be performed for the sub-contract? A. No.

Q. You were in touch at that time, were you not, with the coast, the national, and the state conditions with respect to lumber?

Mr. Olson: Objected to as being wholly immaterial, if the Court please. Macri undertook to furnish the lumber for this job.

Mr. Holman: May it please the Court, that may all [1227] be, but if all parties concerned know conditions as they are, then we're talking with respect to conditions as they are, not with respect to conditions as we would like to have them.

(Testimony of William E. Schaefer.)

The Court: I don't know what effect the shortage of lumber might have. I'll let you pursue the inquiry. A. I knew the conditions.

Q. Sir? A. I did.

Q. And you had the other operations, so you felt the shortage on those? A. I did.

Q. You knew, did you not, that the government itself, even this Bureau, had withdrawn all of its specifications with respect to quality and dry content of lumber; you knew that, did you not, sir?

A. I did not.

Q. You did not? A. No.

Q. Now, isn't it a fact that Mr. Maceri told you respecting lumber in substance this: That he, with Mr. Philp and Mr. Goerig, and I don't know whether he mentioned them to you or not, but he was in the operation of a housing project in the Seattle area?

A. Yes, he mentioned that fact? [1228]

Q. And that he had a priority for securing lumber for that, and he had a priority for securing lumber here, correct? A. That's right.

Q. Yes, and didn't he tell you this, in substance, that in case of emergency he could take from the housing project lumber temporarily for this, so that there wouldn't be any break in there, didn't he tell you that? A. Yes, he did.

Q. Yes, and further, didn't he tell you this, in substance, sir, not that he had an interest in a sawmill, but that he had made a payment of approx-

(Testimony of William E. Schaefer.)

imately ten thousand dollars to a sawmill to be sure to have that lumber; isn't that what he told you?

A. He told me he had an interest in a sawmill.

Q. Yes, sir, and didn't he tell you how it was, that very thing? A. I do not remember that.

Q. You do not remember that Mr. Macri told you he had made a very substantial payment on lumber so he could have it?

A. I don't remember that. He might have told me.

Q. You mean to tell me Mr. Macri had an interest in a sawmill? A. Yes, he did.

Q. Did he say where it was? A. No.

Q. Did you inquire?

A. No, I didn't. That was good enough for me, if he had an interest in a sawmill.

Q. And you didn't ask him where the sawmill was? A. No, I didn't.

Q. And he didn't tell you about making a substantial payment for the lumber for this housing project, and for this project?

A. Not that I can recall.

Q. You say you saw a pile of second-hand lumber? A. That's right.

Q. Can you give me the dimensions of it?

A. It was ship-lap.

Q. Quantity? A. 1 by 8 ship-lap.

Q. Yes; quantity?

A. I'd say there was approximately, I didn't tally it, but just looking at the pile I'd say there was maybe three or four hundred board feet.

(Testimony of William E. Schaefer.)

Q. All right; three or four hundred board feet; that would be about how many boards of ship-lap?

A. Well, it was in various lengths. All I went by is what I seen from the different times that I've seen it on piles and it was tallied, and it would make about three or four hundred board feet. I didn't tally it. [1230]

Q. Now, that lumber itself, that amount of lumber, second-hand lumber, that you saw, you say you saw——

A. Yes.

Q. ——would accommodate about how many structures?

A. I've never taken off the quantity of lumber on structures.

Q. You never have determined the quantity of lumber on structures?

A. No.

Q. And you didn't for this job?

A. No, I didn't.

Q. All right, sir; and are you able now to designate what would be computed to determine the board feet for a structure?

A. I could, but it would take me quite a little while to do it.

Q. I see; you haven't done it, sir? You have not done it?

A. Not on structures.

Q. I see. Can you please tell me what evening you say your superintendent in your presence complained to Macri's superintendent, Ashley?

A. About lumber?

Q. You said he complained. I presume you were talking about lumber.

(Testimony of William E. Schaefer.)

A. No, I didn't—I don't know the date on that.

Q. Well, the month? [1231]

A. I don't know the month.

Q. The place?

A. At the Macri office there in the yard.

Q. The job office? A. The job office, yes.

Q. The time of day?

A. I'd say it was about in the neighborhood of 5 o'clock.

Q. 5 p.m., about; did you make any note at that time with respect to it, yourself?

A. No, I didn't.

Q. Did you make any statement with respect to it yourself? A. To who?

Q. In that conversation? A. No.

Q. Now, the Mixomobile tower was aboard it as placed by your folks, by the Schaefer operations, or had you bought it that way?

A. We bought the equipment that way.

Q. And you had used the equipment that way before it came to this job? A. Yes.

Q. Where? A. Portland.

Q. On what?

A. Oh, I think it was a few jobs before we came up here. [1232]

Q. Well, give me those jobs, will you please?

A. The name of them.

Q. Yes.

A. I'd have to look them up in the record.

Q. How long would it take you, Mr. Schaefer?

A. I don't know.

(Testimony of William E. Schaefer.)

Q. What kind of jobs?

Mr. Olson: I don't see the materiality, your Honor, what jobs or what kind of jobs.

A. I believe one of them was a building——

Mr. Olson: Just a minute; if he was in Portland.

The Court: Well, I'll let him ask what jobs. I don't think we should stop to get the information as to what the names were.

Mr. Holman: No, your Honor.

Q. One was a building? A. Yes.

Q. How high a structure? Stories, I mean.

A. A one story building, about 12 or 14 feet.

Q. 12 or 14 feet high?

A. High, the walls.

Q. And how large was that operation? How long was the mixer on that operation?

A. About two days.

Q. And what else was it used on down there?

A. I don't recall the type of job; it might have been some flat work; I wouldn't say.

Q. Well, I don't want "might have been," but if you know, tell me. A. I don't know.

Q. All right, sir. How long was it used in Portland before it was brought up here?

A. I believe just a few days.

Q. When did you purchase that?

A. I don't know the date on that.

Q. Well, the month, or the year? A. 1944.

Q. You purchased it in 1944; new, or second-hand?

A. It was guaranteed new when we bought it.

(Testimony of William E. Schaefer.)

Q. What do you mean, "guaranteed new"?

A. We bought it from the Mixomobile people.

Q. Oh, a new machine from the Mixomobile; and was it purchased as exhaustible on this job, or was it purchased for use in the city after this job was over?

A. It was purchased for this job, and sold when we got through with this job.

Q. Sold to this job? A. No.

Q. I didn't get you.

A. It was purchased for this job. When we got through with [1234] this job, it was sold, we sold it.

Q. I see; but it was not equipped with the chute or the extensions? You had that ordered especially?

A. That's right.

Q. And who made that?

A. There was a chute that we made, Concrete Construction Company mechanics made, for this mixer before it came up here. It was attached to the hopper, and after being on the job awhile we took the hopper, tower, bucket and that chute off of it.

Q. I know, you've covered that, but who made the chute and the extensions?

A. The first one was as the mixer came up. The second one was made by Mixomobile.

Q. One chute wore out and you had to get another one?

A. No, we dismantled that one with the tower.

Q. I understand, sir; the first chute and the ex-

(Testimony of William E. Schaefer.)

tensions you had made for the purpose of using with the tower? A. That's right.

Q. And then you found that was not a practical matter, and you got chutes direct from the Mixer company, correct? A. No.

Q. What was correct?

A. We took the tower, hopper, bucket and that chute off to get rid of some weight. [1235]

Q. Yes, sir.

A. Easier to move around.

Q. How much weight did you take off by removing that tower? A. 3000 pounds.

Q. A ton and a half, approximately?

A. That's right.

Q. And after that she weighed about 11 tons?

A. After that that mixer weighed 16,000 pounds, 8 tons.

Q. At the time of this conversation you say you had with Mr. Macri with respect to roads were there any operations on the Roza Project in progress? A. On the Roza Project?

Q. Yes. A. Yes.

Q. And you saw them?

A. I believe I seen a few structure excavations before we signed the contract on 1062.

Q. Well, you saw operations, didn't you, sir?

A. Yes, that's what I said.

Q. You saw them digging? A. No.

Q. What did you see?

A. I seen the excavation.

Q. Well, at least you saw the evidence of how

(Testimony of William E. Schaefer.)

they got to excavations, did you not? [1236]

A. Yes.

Q. On the Roza Project, sir; now, did you make any layout map of the roads, the public roads, that were on there? A. No, I didn't.

Q. You had a right of way map, did you not, government right of way map? A. Yes.

Q. And you knew, except for the public roads it indicated, the surrounding country was privately owned, did you not? A. Yes.

Q. And you knew except for the public roads the access to the Roza Project had to be either acquired from private property or not at all, for private roads, sir?

A. For making private roads?

Q. Yes.

A. Well, I understood that anywhere there was structures, why, you could make a road and go in through the fields anyplace to get at these structures or laterals.

Q. In other words, you understood the government had secured that right, sir? A. Yes.

Q. Was there any indication of that on the right of way map? A. Not that I know of.

Q. Was there any communication to you of that?

A. No. [1237]

Q. And you made no inquiry to ascertain, you made no inquiry from the government to ascertain?

A. No.

Mr. Holman: That's all.

(Testimony of William E. Schaefer.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, did you order the Mixomobile yourself, or did your brother do that?

A. Brother done that, after talking to me and the superintendents.

Q. That is, you all——

A. We discussed the operation of this job before he purchased it.

Q. And you had before you the specifications in 1062? A. Sir?

Q. You had before you specifications 1062 when you made that decision? A. Yes.

Q. And the layout structures, structure layout, I mean? A. Yes.

Q. What is the capacity of that Mixomobile? That is, how many yards of cement will it hold at any one time?

A. The drum on that mixer is a two yard drum with a one yard bucket.

Q. What is a bucket? I don't understand that.

A. That is where the dump trucks dump a cubic yard batch [1238] into this bucket, then it is raised into the hopper.

Q. It is a one yard bucket?

A. One yard skip, is the name for it.

Q. And you use that skip to lift your materials into the drum? A. That's right.

Q. And it is a two yard drum?

A. That's right.

(Testimony of William E. Schaefer.)

Q. And I believe it has been testified that Mixo-mobile would handle 20 to 30 yards in an hour, is that correct? A. Yes.

Mr. Hawkins: I think that's all.

The Court: Any redirect?

Mr. Olson: No, your Honor.

The Court: That's all, then.

(Whereupon, there being no further questions, the witness was excused.) [1239]

LAWRENCE E. BUFTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Lawrence E. Bufton.

Q. Where do you reside, Mr. Bufton?

A. Portland, Oregon.

Q. What is your present occupation?

A. I'm chief owner and operator of a silica sand plant in Eugene, Oregon, at the present time.

Q. Are you a graduate or licensed engineer?

A. No, I have some engineering knowledge, but I'm not a graduate engineer or a licensed engineer.

Q. Have you ever been employed or worked as an engineer?

A. Well, was field engineer for the Portland Cement Association for two years.

(Testimony of Lawrence E. Bufton.)

Q. Now, that Portland Cement Association——

A. It is a national organization.

Q. Pardon?

A. A national organization.

Q. Have you had any experience, Mr. Bufton, in concrete [1240] construction work?

A. Considerable.

Q. And over what period of time?

A. Well, I was made secretary of the Pacific Bridge Company in 1907. Everything that I've done since then has been associated with construction work in some way or another.

Mr. Holman: Pardon me; could I get that bridge company? A. Pacific Bridge Company.

Q. Well, now, did you ever personally supervise—— A. Yes.

Q. ——the construction work? A. Yes.

Q. Can you just relate what experience you have had in that regard, Mr. Bufton?

A. Well, I organized a partnership in 1910 and supervised some of my own work until that partnership was dissolved in 1916. I was superintendent for the Tacoma Dredging Company and their subsidiary company until close to the end of 1919, and then the following two years I was field engineer for the Portland Cement Association; then I spent nearly two years managing a concrete pipe plant in Spokane.

Q. When was that, do you know?

A. Well, let's see, it would be about 1921 and 1922. Then [1241] I returned to Portland and the

(Testimony of Lawrence E. Bufton.)

following year I did small work in my own name; then I became associated with Parker Schram Company on a limited partnership way. I was general superintendent for them until the end of 1944.

Q. How many years would that be, then, that you were associated with the Parker Schram Company of Portland? A. Twenty years.

Q. And how many of those years were you general superintendent?

A. Well, about eighteen.

Q. About eighteen? A. Yes.

Q. Are you connected with the Parker Schram Company at the present time? A. No.

Q. Who is their general superintendent at the present time? A. My son.

Q. Now, in connection with these operations, Mr. Bufton, did you have any concrete work?

A. Well, yes, we did thousands of yards of concrete work.

Q. All right; now, getting back to your time that you were connected with the Portland Cement Association, what was the nature of your work with them? You said you were field engineer. What was the nature of your work?

A. Well, we did no designing. We consulted with engineers [1242] about the proper way to use cement. As a matter of fact, up 'till about that time cement had been very poorly used, and the cement association had carried on a lot of experiments in the Lewis Institute in Chicago, and they had found that by the use of less water, proper mixes of sand

(Testimony of Lawrence E. Bufton.)

and gravel, and so forth, much greater strength could be had, and as field engineer our duties were more consulting toward the end of getting better concrete out of Portland Cement.

Q. Well, now, when you were with the Pacific Bridge Company what was the nature of the work you were doing with them, just in general?

A. Well, I was secretary of the work. I did some bidding, but no estimating for them, I wouldn't say.

Q. You did what?

A. I made out bids for them, but I say very little estimating; none of any consequence.

Q. Now, you mentioned you were with a pipe concern in Spokane for about two years, you said, about 1921 and 1922?

A. Yes.

Q. Did you have any experience with any concrete work with them?

A. Well, we made concrete pipe; practically all of our pipe was used by irrigation districts, and we laid a considerable amount of it. We did very little formed concrete [1243] work, practically none.

Q. Mostly concrete pipe, you say.

A. That is right.

Q. In connection with what kind of systems?

A. Irrigation systems.

Q. Did you say what capacity you had with this pipe plant in Spokane?

A. Well, I was associated with another man, and we operated three concrete pipe plants at that time, one in Spokane, one in Helena, Montana, and one in Grand Forks, British Columbia.

(Testimony of Lawrence E. Bufton.)

Q. Now, did you do any construction work east of the Cascade Mountains while you were connected with the Spokane plant, other than this pipe work?

A. During that period of time I didn't.

Q. Did you answer my question, Mr. Bufton?

A. Beg pardon?

Q. Did you do any construction work other than this pipe work during the time?

A. Not during that period, no.

Q. Have you had any experience with reference to hauling materials, and its cost and expense?

A. Oh, yes. The first work I ever did east of the Cascade Mountains was reservoirs in Pendleton, Oregon, and we had 8000 feet of concrete conduit from the headworks. [1244] That was in 1913-'14, I think, and the Parker Schram Company done a great deal of work east of the Cascades. We built the Walla Walla Mill Creek dam, we did miles of work for the telephone company, paved the airport at Baker, we cleared the right of way from Pendleton to Baker, I think, and we built the telephone line from Baker to the Snake River, that is, all except wire stringing, and then during the war period it was necessary to build a line, new circuits, very fast, from The Dallas to Granite Falls. We hauled all the materials in for cross arms and line materials.

Q. Is this while you were general superintendent of the Parker Schram Company?

A. Yes. We went over that line twice.

(Testimony of Lawrence E. Bufton.)

Q. Was this done under your supervision and direction?

A. Under my general supervision.

Q. Pardon?

A. My general supervision, I said.

Q. What year was this done, about, if it was during the war?

A. That must have been '42, about. It might have been '43, however.

Q. Now, this dam that you say you built, what dam is that?

A. Mill Creek Dam, at Walla Walla.

Q. And what was the nature of that work?

A. Well, there was a fill there, something over a million [1245] yards.

Q. A fill of what? A. Earth fill.

Q. Was there any concrete work connected with that?

A. Well, yes, concrete diversion dam, and concrete diversion structures, a concrete conduit that was under the dam, concrete control house, and some of the canals, canal lining.

Q. Now, in connection with your work at Parker Schram, did you ever do any estimating or bidding in connection with that work?

A. Yes, I did nearly all their bidding.

Q. And over a period of how many years?

A. Well, let's say a period of eighteen years.

Q. And did that include construction, concrete construction? A. Yes, a great deal of it.

(Testimony of Lawrence E. Bufton.)

Q. Can you give us any specific instances of your bidding for them?

A. The biggest job that we did was a joint venture. We built the concrete pontoon bridge across Lake Washington.

Q. The floating bridge?

A. Yes, a mile and a quarter long, four lanes wide, walls on each side.

Q. Who made up the estimate?

A. I did it, finally. I had some help there. Our problem [1246] was more what we were going to do before we got the work started. We spent half a million dollars before we got a pay quantity. We had to build graving docks.

Q. Were you one of the parties who made up that estimate?

A. Yes, I was.

Q. Who made up the final bid?

A. We submitted all the figures, and I was the one who finally compiled all the figures.

Q. About when was that?

A. Let's see—that must have been '39 or '40.

Q. Now, have you ever had anything to do with reclamation concrete construction work?

A. Well, except bidding on some reclamation work, very little, however, and I couldn't recall the names of the district, until about a year ago. Now, a little over a year ago I made an examination for the Bank of America of some work that was under construction in the Deschutes Project. I spent several days on that project with the engineers and contractors.

(Testimony of Lawrence E. Bufton.)

Q. How did you happen to make that examination?

A. Well, this contractor had two jobs. I examined both of them. One of them was a job he was losing a lot of money on. That was the reason for it, I presume.

Mr. Holman: May I have the last of that answer?

A. The contractor had two jobs. One of them he was losing [1247] heavily. I presume that was the reason why the bank asked me to make an examination for them, and this work I speak of now, in the Deschutes Project, I looked up some notes I had, was Specification 1100.

Q. Whose specification?

A. Well, that's Bureau of Reclamation specifications number 1100. The contract was about twice as big as this contract. There were numerous concrete structures.

Q. Pardon me, you say twice as big. Can you tell us approximately how many cubic yards of concrete?

A. Well, I was thinking in dollars, more or less, more than number. That contract price over there was something over \$245,000.00, and I've seen the preliminary estimates on this job, which were, I think, about \$128,000.00.

Q. All right; as far as the concrete work was concerned, what kind of concrete work was this Deschutes, Oregon, job?

A. Well, the structures there were for the same

(Testimony of Lawrence E. Bufton.)

purpose as the structures here; however, they weren't of exactly the same type. I would say that the form work on those structures was more difficult, if anything, than the form work on these structures here.

A. Well, the inlets and the outlets were warped sections, I mean they curved horizontally and vertically, which is a [1248] different form to fabricate, to start with, and it is difficult to place. On that job there was 3550 cubic yards of concrete in the preliminary estimate.

Q. 3500, you say?

A. 3550 cubic yards, in the preliminary estimate. I was on the job in the early part of February.

Q. What year, by the way, were you on it?

A. 1946.

A. That's about a year ago, then?

A. Yes, just, a little over a year ago. The work was started, well, they got their notice to proceed in October, and the work was started around the first of November. There was considerable preliminary work too be done in the way of constructing bunkers and so forth, before the concrete could be started, also the pre-fabrication of forms. The concrete practically started the first of December. At the end of January they estimated for payment 514 cubic yards of concrete.

Q. Now, Mr. Bufton, you say that the concrete structures there were for the same general purpose?

A. Yes.

Q. As the concrete structures on 1062?

(Testimony of Lawrence E. Bufton.)

A. That's right.

Q. Can you develop that a little more, to show the similarity between the job you were over and this one? [1249]

A. Well, I mean they were to control the flow of water. It was a gravity system, no pumping plant involved, passages through siphons, and in a general way, to control water over the land to be irrigated.

Q. Were the concrete structures on this job that you went over in Oregon, being the Bureau of Reclamation specifications 1100, did they involve excavations? A. Oh, yes.

Q. And the placing of structures in excavations?

A. Yes, sir, and the pay quantities set up were the same as here, I would say very closely, I mean in the way of the work required to be done.

Q. Now, how about that job, Mr. Bufton, as to whether or not the same contractor was doing the excavation and the concrete structures, or was there a sub-contract on it?

A. No, the general contractor sub-contracted his work to a sub-contractor at a price of \$30.00 per cubic yard.

Q. Sub-contracted that work?

A. A sub-contractor on the concrete work had \$30.00 per cubic yard, and he furnished all the form lumber.

Mr. Holman: Just a minute. He said "he" furnished.

Q. I was going to ask him who.

A. Beg your pardon?

(Testimony of Lawrence E. Bufton.)

Q. Who furnished the lumber? It isn't quite clear whether it was the contractor or the sub-contractor. [1250]

A. The sub-contractor provided all his form lumber and all his concrete set-up; in fact, he had all the concrete work, all there was to do with it.

Q. He furnished all his form lumber?

A. Aggregate and cement of course were furnished by the Bureau of Reclamation, as they are in all of those jobs.

Q. Now, who did the excavation work for that?

A. The principal contractor.

Q. Then the only difference between that contract or sub-contract on 1100 and 1062 was that the sub-contractor furnished the lumber on the one down in Oregon, and not down here?

Mr. Holman: Just a minute. The only difference in that respect, you mean, don't you? I object to the question otherwise. If he directs it to this one thing, that is all right.

A. There was that difference, then.

The Court: There was that difference, and we'll not go into how many others unless you want to.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Bufton, did you have an opportunity to examine the excavations that were made down there?

A. Yes, I went over the work with the engineer and also with the contractor, or rather, the con-

(Testimony of Lawrence E. Bufton.)

tractor's superintendent, and I talked with the subcontractor's superintendent. [1251]

Q. And what was the situation with reference to the banks of the excavations and lateral clearance, down there?

A. Well, now, a good part of the excavation there was made by tractor and 'dozer, and naturally the banks were sloped. You can't make a straight bank with a 'dozer.

Q. You say the banks were sloped?

A. They were sloped, yes. I would say they were flatter than 1 to 1.

Q. Were flatter than 1 to 1?

A. Flatter than 1 to 1.

Q. Now, have you been over the job on 1062?

A. I went over the 1062 and 1068 with Mr. Schaefer, Mr. Darcy, and Mr. Waltie, a week ago last Saturday. We spent about six hours on the two jobs, I would say.

Q. Were you on the job at any time during construction? A. No, I was not.

Q. Did you examine the concrete structures as they existed out on the project then?

A. We got out and examined structures all the way along, I don't know how many; a great number on both projects. Every time we'd come to a new structure we would get out of the car and go and look at it, and the chute and the diversion structure, and so forth.

Q. Now, have you examined, Mr. Bufton, the specifications covering 1062, being plaintiff's Exhibit 3, and the [1252] structural layout plans—

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. —being plaintiff's Exhibit 12 in this case?
Have you examined those?

A. Well, I've read the specifications and examined the plans.

Q. On 1062, this job? A. Yes.

Q. And assuming, Mr. Bufton—

Mr. Holman: Are you through with qualifications?

Mr. Olson: Yes.

Mr. Holman: May I ask a question, please?

Mr. Olson: Yes.

Voir Dire Examination

By Mr. Holman:

Q. Mr. Bufton, when you spoke of being with the Portland Cement Company—

A. Not the cement company; the cement association.

Q. Portland Cement Association, is the correct name Superior Portland Cement Association?

A. Portland Cement Association.

Q. Superior Portland Cement?

A. Oh, no; you're thinking of a cement concern. This is an organization. They don't sell cement at all.

Q. I see; and what was your capacity with them?

A. Field engineer, I said.

Q. For the association? [1253]

A. I beg pardon?

Q. For the association itself? A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And its members?

A. And its members, yes. I wasn't working directly for any manufacturer at all.

Q. Now, on the Lake Washington bridge the principal contractor was the Puget Sound Bridge and Dredge, was it not?

A. It was a joint venture by the Puget Sound Bridge and Dredge Company, Parker Schram Company, Jack Pomeroy, and that California man, I can't think of his name right now.

Q. Goerig?

A. No, it wasn't Goerig; it was a California man; I'll think of his name in a minute. Does it matter? There were four contractors.

Q. I'm not captious on that. Mr. Goerig put in the piers for the bridge down there.

A. No, no, that was the approach to the pontoon bridge, I think.

Q. Yes, sir. That was built, was it not, under the——

A. Toll Bridge Authority?

Q. ——Toll Bridge Authority. A. Yes.

Q. And the estimates were prepared by Lacey V. Murrow, the State Highway Engineer? [1254]

A. Not the estimates it was bid upon. Lacey Murrow made an estimate of what it would cost.

Q. Preliminary estimates were made by Lacey Murrow?

A. The contractor makes his estimates too. The contractor doesn't care what the engineer estimates. If he knows his stuff he makes his own estimate.

(Testimony of Lawrence E. Bufton.)

Q. That may all be, sir, but the preliminary estimate for the job was made by Lacey Murrow?

A. For the Toll Bridge Authority.

Q. For the Toll Bridge Authority, and those were submitted to the bidders, were they not?

A. They were not, at all. Lacey Murrow submitted to the Toll Bridge Authority his estimate of what he thought the contractor would take the work for. What I'm talking about is the estimates that we made up to determine what we would bid on the job. Lacey Murrow's estimate might have been half a million dollars higher than ours.

Q. Be all that as it may, you were supplied with a preliminary estimate as to quantities, were you not?

A. Yes, we bid on unit quantities, like this contract here.

Q. All right, sir.

Mr. Holman: That's all I have, your Honor.

The Court: All right, proceed.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, you say you have examined these completed [1255] structures? A. Yes.

Q. And examined the structure layout plans and specifications. Now, what in your opinion would be the lateral clearance reasonably required not only at the foundation of the structure but from

(Testimony of Lawrence E. Bufton.)

there on up, and your opinion as to any slope reasonably required for the banks——

A. Yes, indeed.

Q. ——wait a minute; in order, Mr. Bufton, for a contractor to properly build and assemble in the excavation forms for the concrete structures to be placed therein, and to thereafter remove the forms, the panels, from the completed concrete structures?

Mr. Holman: Just a minute. May we have the question, your Honor?

The Court: Yes, all right, the reporter can read it, and if you will wait until the lawyers make their objections.

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: Your Honor, we object to that question for this reason: I don't think it is within the issues of this case; the language of the question is not in accordance with the language of the specifications. In the second place, there is no way for us to tell what [1256] this witness may mean as to the word "proper." Counsel has asked this witness what is the necessary clearance or required clearance in order for the Concrete Construction Company to properly place its forms and properly remove those forms. Now, I don't think that that word is sufficiently definite on which to predicate a hypothetical question.

The Court: Do you have an objection?

Mr. Holman: I join in that objection, your

(Testimony of Lawrence E. Bufton.)

Honor, plus the fact that in order to have a true test here, the question would have to disclose the field excavations and the field operations from both the point of the principal contractor and the sub-contractor, and to ask this gentleman as an expert to state what was reasonable widths or depths, or reasonable dimensions, let's say, is asking him to substitute his judgment for the Court. It is not a true——

The Court: To substitute it for what?

Mr. Holman: His judgment for that of the Court. That is the very thing before your Honor to be determined, and it is not the proper basis for a hypothetical question. I have this in mind, your Honor. This witness can testify, for instance, as he qualified a while ago, with respect to cost of hauling; he's had that experience. He could testify with respect to the amount of lumber in [1257] the structure, and the amount of aggregate, he's had that experience, as reasonable amounts, but counsel is now asking the question of this witness to state for this case what are reasonable operations as between the contractor and the sub-contractor, without the question showing all that has come before your Honor. It doesn't even show in his question that this gentleman has been present and heard it.

The Court: Is it your position, Mr. Holman, that an expert can testify only on a hypothetical question based on testimony in the case?

Mr. Holman: No; the hypothetical question itself must be conformable to what is then before the Court.

(Testimony of Lawrence E. Bufton.)

The Court: Don't you think an expert can go out and make an examination of a structure, and testify from his background of experience and special knowledge as to technical matters in connection with the structure?

Mr. Holman: I think he can do that, but I think he can't substitute his judgment for the Court's judgment on the very matter before the Court, namely, the very question of reasonableness between the contractor and the sub-contractor, and that's what is asked for.

The Court: Well, how am I to determine the reasonableness if I haven't any technical knowledge as an engineer? I understand your position is that the [1258] specifications require no particular clearance and slope on these excavations. That's correct, isn't it?

Mr. Holman: Yes, one particular one.

The Court: But there is no question but that under this sub-contract it was the duty of Mr. Macri to make these excavations?

Mr. Holman: That is correct.

The Court: Now, the question of how he should make them, and what clearance he should allow, is a question of what would be reasonably necessary under all the circumstances.

Mr. Holman: That, may it please the Court, is a matter that I claim in objecting to this question is a matter for your Honor to determine, in view of the fact that counsel waived a jury, or that a jury was waived, and that this gentleman, regard-

(Testimony of Lawrence E. Bufton.)

less of his qualifications, can't sit there and pass judgment upon the very thing that's the issue before your Honor.

The Court: I think it is a proper subject of expert testimony. I'll overrule the objection.

Mr. Hawkins: I would like to make further objection, your Honor, that this witness has testified to no experience in placing concrete forms in excavations.

Witness: Yes, I have, thousands of square feet of them, supervised the placing of them. [1259]

Mr. Hawkins: Well, I understood his testimony to be that the only type of work of this kind that he had any experience with was that in connection with some job down in Oregon with which there was a loss, a bank had requested him to go out and look at it after it was under way. Now, I don't believe the witness has testified to any experience of this particular type.

The Court: Well, he doesn't have to have had experience in this particular narrow field, does he, if he has general concrete experience over a long period of years? You don't have to have an expert on each particular line, do you?

Mr. Hawkins: Well, that may be. Here we have forms set down in the ground. We don't know whether he's had experience on buildings where there was an open area around.

The Court: I think he's shown general qualifications. Overrule the objection. Do you understand the question?

(Testimony of Lawrence E. Bufton.)

Witness: I know what the question was asked, and what the answer is. You have to place forms, and your sheeting, and your strong-backs, and your ties, whatever they might be, which altogether take up 9 inches to a foot. Now, a man's got to have room enough to work to get those forms in there, and to get them out. I think the best answer [1260] that can be given to that question is the fact that the Bureau of Reclamation have done this thing over thousands and thousands of times, and they apparently have come to the conclusion that the best way it can be done would be to the 1 to 1 slope on the side, and they specify it in their specifications in that way, defining the amount that they are going to pay for.

Q. Well, what is your opinion?

A. I think that a proper excavation should be at least a foot clearance on the outside of the base of the structure, and on a slope, so a man can bend over, so forms can be slid down there and placed, and straightened up. Then where they're pulled, if the nest of forms is made out of ship-lap, there is bound to be a little thin between the boards. When you pull that up you've got a friction to overcome. If you can turn the thing over and slide it out again, you have then worked in a proper excavation.

Q. Do I understand, then, Mr. Bufton, that it is your opinion that one foot out from the base of the foundation of the structure, with a 1 to 1 slope,

(Testimony of Lawrence E. Bufton.)

is a reasonable and is the reasonably required lateral clearance for the placing and removal of forms?

A. Yes.

Mr. Holman: Just a minute; we object to that.

Mr. Olson: Wait until I finish. [1261]

The Court: Objected to as leading, I presume?

Mr. Hawkins: Yes, your Honor, and also he's already interrogated about that very particular thing, and the answer is on record.

The Court: I think he was just trying to clarify the answer. If you want to ask him again what his opinion is, I think I know what he testified to.

Mr. Olson: Well, I do too, but it is a matter of counsel bringing the question out, he said "so and so, but he didn't say just this."

The Court: Well, go ahead, if you want to make it more particular.

Direct Examination

(Continued)

By Mr. Olson:

Q. Then with reference to your answer that you just have given, Mr. Bufton, I'm not sure as to whether you've expressed it as to what your personal opinion based on your experience is, with reference to this lateral clearance and the slope of the bank, as regards to what is reasonably required to build these structures as you have examined them out on this specification 1062.

Mr. Holman: Just a minute; I submit counsel is now trying a reiteration of the very thing he's accomplished by this expert.

(Testimony of Lawrence E. Bufton.)

The Court: It is to clarify his prior answer. He said the Bureau had come to such and such a conclusion. [1262]

It isn't entirely clear to me whether he adopted that opinion or not. I'll overrule the objection. I suppose the record should show that the same objection stands.

Mr. Holman: And I would like to move striking from that prior answer his conclusion that apparently the Bureau has adopted those specifications, because the specifications speak for themselves, your Honor, and it is immaterial what this gentleman thinks about what the Bureau has done.

Mr. Olson: Your Honor, it is explanatory of this man's testimony.

The Court: Well, I'll let it stand. I think the only thing the Court is concerned with now is his opinion. That is the only thing the Court will regard in the answer, is his opinion.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I don't think the question is quite finished yet.

Direct Examination
(Continued)

By Mr. Olson:

Q. Please state what your own opinion is, based on your experience and your examination of these structures, plans and specifications, and structural

(Testimony of Lawrence E. Bufton.)

layout plan, with reference to the matters contained in my question. [1263]

Mr. Holman: I object to that as having been already answered by this witness; reiteration.

The Court: Overruled.

Witness: Well, you would certainly have to have a foot of clearance laterally on the same level at the bottom in order to let your plate down there, when you're being pushed away from your work, as you are, by your strong-backs and your bolts and so forth, and if I were doing the excavation myself, and putting those forms in, I certainly wouldn't make the excavation anything except on a slope.

Q. Of approximately what?

A. I think that is a proper way to do the work, yes.

Q. Approximately what slope?

A. Not less than 1 to 1.

Q. All right. Now, counsel raised some question as to what experience, if any, you had in this particular type of concrete placement. Have you had any experience, Mr. Bufton?

A. Oh, we've built head walls—that's a silly question. I refuse to answer it.

The Court: Well, I think you should answer it, Mr. Bufton. We're making a record here.

Witness: Can I say I'm annoyed, then? Yes, I have had lots of experience of that nature. [1264]

Q. Of what nature, specifically?

A. Well, I mean head walls, and structures of this same sort, structures to convey water, for the same purpose and everything else.

(Testimony of Lawrence E. Bufton.)

Q. Now, counsel brought up another thing with reference to this Oregon job that you had experience with, that had sustained a loss. Did you indicate or do you intend to indicate that there was a loss on this Portland job as far as the concrete structure portion of the job was concerned?

A. The man was making money on the reclamation job, but he was losing money on the other job.

Q. And the other job was what?

A. A clearing job from Albany to Toledo, Oregon.

Q. Having in mind and considering the specifications covering 1062, being plaintiff's Exhibit 3, the structural layout plan, being plaintiff's Exhibit 12, your examination made in the field of the completed structures on 1062, and assuming that the form lumber to be used for the concrete structure forms was furnished in proper quality and on time, as needed and required in making the panels, and assuming further that the excavations were made by the principal contractor with the lateral clearance of at least one foot at the foundation of the structure, and laterally outside of the structure, and the bank is sloped [1265] to a 1 to 1 slope, and assuming further that these excavations, the floor of the excavations, are hand excavated in accordance with the structural layout plan, so as to be in proper condition to receive, or be in condition to receive the concrete as provided for in the structural layout plans, and assuming further that the excavations were made ahead in that manner suf-

(Testimony of Lawrence E. Bufton.)

ficiently far enough so that the contractor in assembling and making the structure forms and pouring the concrete may proceed without being delayed, what in your opinion, Mr. Bufton, would be the length of time reasonably required by a subcontractor to assemble and place those forms in the excavation, pour the concrete, and to remove the forms, and to complete that part of the job called for in specifications 1062?

Mr. Holman: Just a minute, Mr. Bufton. I object to the question for the following reasons, your Honor. In the first place counsel has used in his question the term bank. Now, if by bank counsel advises the witness that he means all exterior excavations, that is one thing, all sides. If he's talking about one bank, it can't be competent. Counsel has also left out of his question elements which he has brought into this case and put forth to the Court as affecting the position of the subcontractor, namely the type of equipment, its weight, its [1266] accessibility, and the distance from the point of securing aggregates to the point of deposit, and the distance from the job yard to the point of deposit. In other words, counsel is leaving out some of the elements, your Honor, and he's left out the additional element as to whether or not there was a project line-out or a line-out upon which the work could be made as required by the sub-contract.

The Court: Mr. Hawkins?

(Testimony of Lawrence E. Bufton.)

Mr. Hawkins: I join in that objection, your Honor.

Mr. Olson: Your Honor, with reference to the location of the stockpile, I might ask this witness if he observed where that was, and include that in the question.

The Court: This point that counsel raises about the banks, I don't remember just how you brought that in, but the thought that I have in mind, some of these banks were supposed to be excavated vertically, and some with a slope to 1 to 1——

Mr. Olson: Well, I think my question is intended, at any rate, to refer to the exterior banks.

The Court: Exterior banks?

Mr. Holman: That would be all exterior banks?

Mr. Olson: All exterior banks that were not——

Mr. Holman: Let's say all outside banks. [1267]

Mr. Olson: All exterior banks that were not used for pouring concrete against.

The Court: All exterior banks where an outside form is required; is that what you had reference to?

Mr. Holman: That was my objection to that phase of it. He just used the term "bank." There is quite a difference.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, when you were out on the job 1062 did you see where the stockpile was?

A. Yes, I saw it.

(Testimony of Lawrence E. Bufton.)

Q. You're aware of its location with respect to the structures? A. Yes, I was there.

Q. And having that feature in mind, then, and also having in mind when I used the term "bank" that I refer to the exterior banks where outside panels were required, would you then answer the hypothetical question?

The Court: May I ask this; I'm not sure your question refers to a sub-contractor, is that correct?

Mr. Olson: Yes.

The Court: A hypothetical sub-contractor?

Mr. Olson: Yes.

The Court: You're not referring to how long it would take Mr. Schaefer with the men he had?

Mr. Olson: No. [1268]

Mr. Holman: If he's talking about a sub-contractor, I withdraw that objection; it is not involved.

Mr. Olson: Oh, yes; I don't think it would be proper for me to ask how long it would take Mr. Schaefer to do it.

The Court: Then the question of how many men he had and the equipment would be a matter of cross-examination?

Mr. Olson: I intend to touch on the equipment with Mr. Bufton.

The Court: Do you have the question in mind now?

Witness: Not thoroughly. What was the first part?

(Testimony of Lawrence E. Bufton.)

The Court: I wonder if it might not be best to re-frame the question, and put in the elements that we've discussed here, and then objections can be made again. I think it would be better than trying to go back over all this discussion.

Mr. Olson: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, having in mind and considering the specifications covering 1062, being plaintiff's Exhibit 3, and having in mind and considering the structural layout plan, being plaintiff's Exhibit 12, and having in mind your investigation and inspection that you have made out in the field, which you have described in court, of the [1269] completed structures on 1062, and of the location of the stockpile of the aggregate for the concrete, as you examined it on the field, and then assuming, Mr. Bufton, that the excavations being made by the prime contractor were so made that they had a lateral clearance all around the outside of the structure of one foot, and the bank from the base of the foundation of the excavation to the surface of the ground at all points opposite where an outside panel or form was to be placed around the concrete structure had a slope of not less than 1 to 1, and assuming further that the floor or the foundation of the excavation was made so that it was to the proper, or to the

(Testimony of Lawrence E. Bufton.)

elevation or grade as called for by the structural layout plans and the specifications, so that it was ready to receive concrete, and assuming further that the excavations were made sufficiently in advance and far enough ahead so that the concrete forms and concrete pouring could be done and performed without being delayed or held up because of excavations not being ready, and assuming further that the lumber, the form lumber, was being furnished by the prime contractor and was furnished of proper quality and on time for these forms as needed, so that there was no delay in making the panels, how long would it take, in your opinion, Mr. Bufton, for a sub-contractor to assemble, make and place the concrete forms, [1270] the structure forms, in the excavation, to then pour the concrete and to place the required steel and re-inforcing materials required in those specifications, to then remove the forms and to finish the concrete and to complete all of the structures as required in accordance with specifications 1062?

Mr. Holman: Just one minute. Your Honor, I have only this one objection, and it is largely by way of suggestion. When he uses the term "a sub-contractor", if he means an experienced and qualified sub-contractor; if that is what he means I have no objection to the question.

Mr. Olson: I'll include that in my question.

The Court: Yes, I think that should be understood as included.

(Testimony of Lawrence E. Bufton.)

Witness: Well, an experienced contractor—well, a contractor would show that he wasn't experienced if it took him over four months to do that job.

Q. I didn't get that.

A. I say, an experienced contractor couldn't take over four months to do that job under those conditions.

Q. Not over four months?

A. Not over four months, under those conditions.

Q. Now, using the same hypothetical question, what in your opinion would be the reasonable cost and value of the [1271] performance of that work by an experienced and qualified sub-contractor?

Mr. Holman: Just a minute. May it please the Court, I object to that as having already been covered by the witness's statement, his previous statement, as to a unit price—strike, that's incorrect. I beg your pardon. You gave a unit price on another job, did you not, Mr. Bufton?

A. That's right.

The Court: Do you have any objection?

Mr. Hawkins: No objection, your Honor.

Witness: Well, anticipating that question, I made up a little memo last night, or yesterday afternoon. I don't know whether this is proper or not.

Mr. Holman: May it please the Court, counsel has asked him——

A. Well, I'm going to take my answer from this.

Mr. Holman: Very well, but I'm submitting this, your Honor. An expert witness should give his

(Testimony of Lawrence E. Bufton.)

answer to the question, and then if he needs to explain it, he should state before-hand that he does, and if he doesn't, then it is a matter and within the province of cross-examination.

The Court: Yes, I think that is true. The question now is—I have no objection to your consulting [1272] a memo as to what your figures are, but I think the question is the reasonable cost or value, and that should be your opinion. Counsel can ask further questions if he wants further detailed information.

Witness: After calculating the work to be done, in order to give a reasonable answer, I figured \$27.88 per cubic yard.

Q. \$27.88 per—— A. Cubic yard.

Q. ——cubic yard. Now, did you make out an estimate in arriving at those figures on this job, Mr. Bufton?

A. I made it out yesterday afternoon when the Court was not in session.

Q. Does that figure include an allowance for the services of the sub-contractor?

A. Beg your pardon?

Q. I say, does that figure include an allowance for the services of the sub-contractor himself?

A. Yes.

Q. And overhead?

A. Well, I don't know whether it would be what a particular sub-contractor would figure or not, but I have an allowance in my figures for that.

Q. All right.

(Testimony of Lawrence E. Bufton.)

The Court: What was that last question, is that [1273] general overhead of the sub-contractor? Is that what the question was?

Q. I'm referring to overhead expenses on this job.

A. I have in my figures here covered home office and general supervision.

Q. Well, perhaps it would be informative. Could you give your estimate?

Mr. Holman: That I object to, your Honor. It is a matter of cross-examination.

Mr. Olson: I have no objection if you want to bring it out on cross-examination.

The Court: I think you may bring out what elements the total includes, but I don't think the entire estimate should be brought out.

Mr. Olson: I didn't get your Honor.

The Court: I think you may ask him, as you have done, what elements it includes, but I don't think it would be proper to bring out the details of the estimate on direct examination.

Mr. Olson: Now, I was going to propound another hypothetical question, your Honor, but maybe I can go on to something else.

The Court: Well, we can recess now.

Mr. Olson: I have another question or two I could go into. [1274]

The Court: Well, all right, you may ask him.

Mr. Olson: I hate to go into this other thing at five minutes to twelve.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, there's been some discussion here in the testimony, questions and answers, concerning the use of a transit mixer instead of the Mixomobile on this job.

A. You mean a transit mixer?

Q. Yes. I'll ask you first, have you seen the picture of the Mixomobile used on this job?

A. Yes.

Q. What is the situation, or what is your opinion, as to whether or not a Mixomobile as used by Mr. Schaefer and of which a picture is in evidence here, being pictures 35 and 36 of plaintiff's Exhibit 49, what is your opinion as to whether or not that is proper and correct equipment for use on this job out on the terrain as you saw it, referring to 1062?

A. I think the equipment used on this job is the best that the contractor could purchase.

Mr. Hawkins: I object to that as not responsive.

A. That is my thought, my opinion.

Mr. Holman: I do, too.

The Court: Well, I think that is in answer to it. I'll take it as an answer that in his opinion it was suitable. [1275]

Mr. Hawkins: If that is his opinion, yes. I gathered from his statement that isn't quite what he meant. He said it was the best that could be bought.

The Court: Will you read the answer?

(Testimony of Lawrence E. Bufton.)

(Whereupon, the reporter read the last previous answer of the witness.)

The Court: Well, I'll strike that answer. It was wartime. I don't know what kind he could have purchased.

Direct Examination

(Continued)

By Mr. Olson:

Q. I'm not asking as to availability of equipment. I'm asking as to whether or not it was suitable. A. It was suitable, in my opinion.

Q. And how would the suitability of this Mixomobile be as compared with a transit mixer on this job, having in mind your inspection of the terrain and the structures?

A. Well, it is my opinion that it is a more economical type of equipment to use than a transit mixer is. I can explain that by saying this, that when you mix your concrete by transit mixer, you can haul about, well, in this case, one-half as much materials as you haul in a batch truck. In other words, a truck batching three 1-yard batches, as has been explained here, hauls twice as much concrete over the road in a given time as a [1276] transit mixer will, and besides that, the transit mixer has to remain at the site where the concrete is being poured until the concrete is entirely out of the mixer, whereas when you have a Mixomobile one batch can be dumped in the skip, loaded into the

(Testimony of Lawrence E. Bufton.)

drum, and the second one, if you want to do it that way, and get the third batch in there and get it on its way back to the batching plant in less time than the transit mixer can.

The Court: We'll recess now. This case will be resumed at 2 o'clock this afternoon.

(Whereupon, the Court took a recess in this cause until March 6, 1947, at 2 o'clock p.m.)

Yakima, Washington, March 6, 1947,
2 o'Clock P. M.

(All parties present as before and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, still having in mind and taking into consideration the completed concrete structures and the terrain as you examined it approximately ten days ago on job 1062, as you have testified to here, and the specifications covering 1062, being plaintiff's Exhibit 3, the structural layout plan, being plaintiff's Exhibit 12, and also having in mind the location of the aggregate [1277] stockpile as located out on 1062 and as you saw it when you were out there, as to its location, and then assuming that instead of having the lumber furnished of a quality that was adaptable at all times to the making of form panels for this type of work, and

(Testimony of Lawrence E. Bufton.)

also that the lumber was not furnished so as to be available at all times for use in making forms, and assuming further that the excavations, instead of having lateral clearance of one foot outside of the concrete structure at its foundation, and instead of the banks being sloped to a 1 to 1 slope at the points where outside forms had to be placed for the concrete forms, that such banks were excavated vertically or nearly so, and that the clearance between the outside of the line of the concrete and the outside banks was so limited that in installing the forms, the outside form panels, the banks had to be dug into to make room for the whalers or strong-backs, and at times had to be dug out and excavated in order to get the forms themselves in, and assuming further that the panels is being removed, because of the restricted clearance, were damaged and had to be taken back to the yard for repair, and assuming further that instead of the excavations being completed in advance of the placing of concrete structures and concrete forms they were not available as needed, and assuming further that the floor or foundation of the [1278] excavation was not completed by hand excavation so that they were ready, available or prepared so as to receive the concrete, and assuming that the carpenters or employees of the concern which was putting in the forms had to do much of the foundation or floor excavation on the excavations, so that the job, instead of being completed in approximately four months' time, as you have testified is ample, that

(Testimony of Lawrence E. Bufton.)

the job having been taken over on March 13, 1944, could not be completed, because of the things I have enumerated, until some twelve and a half months later, or approximately April 8, 1945, how, in your opinion, and to what extent would that affect the cost, the reasonable cost and value, of the performance of the installation of the concrete forms, the making of the form lumber into the panels, the pouring of the concrete, including the cutting, bending and installing of the re-inforcing steel, and the furnishing of the nails, the removal and cleaning of the panels from the concrete after it was poured?

Mr. Holman: I will object to the question, your Honor, as eliminating one essential feature. Counsel's assumption would have to include no defective forms, and it doesn't include that, and I object further for the reason that the question doesn't show an operation in line with the sub-contract as called for by the terms of [1279] the sub-contract, and therefore it is outside of the issues, and I object for the further reason, your Honor, that it is immaterial what this gentleman thinks with respect to the purport of the question. Again counsel is asking this gentleman to pass upon the very issues that are before your Honor. He's asking him to determine the factual matter as against an opinion matter, your Honor.

Mr. Hawkins: Your Honor, I join in those objections for the reasons that counsel has stated, and I also would like to point out that in the various items detailed by counsel that the witness should

(Testimony of Lawrence E. Bufton.)

have in mind in giving his opinion, there is no definite, quantitative statement as to the amount of lumber furnished that wasn't adaptable, there is no definite statement as to the number of slopes that weren't 1 to 1, or the number of slopes that were vertical, or the distance between the concrete wall and the vertical bank; there was no definite statement as to the number of excavations in which it was necessary to do shovel work in order to put the strongbacks in place; there is no definite statement as to the extent of the damage done to the panels or as to the number of panels that were damaged in removing; there is no definite statement as to the extent, if any, of the failure to make timely excavations, that is, whether an excavation was not dug within a half an hour or within [1280] two hours or within two weeks after plaintiff had notified, if such notification was made, notified defendant Macri to have the excavation ready; there is no definite statement as to the depth as to which these excavations were made, and with particular reference to counsel's statement that the floors were not dug so as to receive concrete. None of the elements that I have mentioned has counsel given any definite quantitative value to. I therefore submit to the Court that it is impossible for this witness or any other expert witness to give an opinion based upon the items mentioned in counsel's question. It is impossible for such witness to state the effect on the cost. Those items may be trivial, or they may be substantial. It is wholly impossible for this wit-

(Testimony of Lawrence E. Bufton.)

ness or myself or the Court to determine from the facts supposed by counsel in his hypothetical question, to make any determination that counsel is now calling for. I mean all those items are variable and subject to modification, change, and so on, and I think the question, therefore, is improper, and that no one could answer it.

The Court: I think this presents the same question that the Court has ruled upon before in the case of another witness, and I take the same view of it as I did then. It seems to me impossible, because of the [1281] things just pointed out by Mr. Hawkins, that you could arrive at any definite conclusion by expression of an opinion of an expert witness as to how much the cost was increased. I assume that what the question is designed to elicit is the effect of these various elements that have been enumerated on the cost of the operation, and to a rough or approximate degree, the extent to which they affect it, in the opinion of the expert. I might say that the Court wouldn't take as evidence that this increased the cost by any number of dollars and cents, or would not take that as a finding of what the increase was. I will consider this as merely an indication of the expert's opinion as to the effect on cost, and the general or approximate effect on the extent. With that thought in mind I'll overrule the objections.

Mr. Holman: I was going to say, in view of your Honor's harking back in the record to the prior

(Testimony of Lawrence E. Bufton.)

situation, I would like to add to my objection this, that there has been no written claim presented as called for by the sub-contract, nor does the hypothetical question contemplate that, and I adopt Mr. Hawkins' objections.

The Court: That may be shown as an additional ground to the objection. Now, do you have the question in mind?

Witness: I think so. I couldn't answer that, evaluate [1282] that from a dollar standpoint, as your Honor said. When conditions of that sort existed, it certainly would definitely affect the ultimate cost of the work. Any job that takes 12 or 13 months to do that should be done in 4 months is wrong somewhere along the line. If the reason for the additional length of time required is because of the lack of preparation and the quantity of forms or the amount of excavation performed, I mean, well, speaking of quantity of excavation performed, I'll have to describe that. You see, the base that the concrete is going to sit upon has to be formed first. Now, that work can't all be done by any machine that's ever been made. There is a great deal of hand work necessary to do that work, and as to the clearance, the men who had to place forms and remove them had to have sufficient working clearance, or they couldn't perform their work. If in the situation described here, carpenters go out and do excavation work that they're not supposed to do, in the first place a carpenter doesn't want to handle a muck stick, and in the second place, he's

(Testimony of Lawrence E. Bufton.)

delayed an amount of time I couldn't evaluate, and the equipment is tied up and not used, managerial expense would be increased; well, getting back to the depreciation, again, their equipment, I mean, you might think of that as depreciation. You can not depreciate a piece of machinery [1283] just on the quantity of work that's performed by that machinery. In other words, you can't say a concrete mixer is one-tenth worn out when 1000 yards of concrete has been poured through it. The minute that machine leaves the factory obsolescence starts to work on it. If the equipment has been tied up 12 or 13 months instead of 4 months, that's an element; and then if men capable of performing what they believe to be a good day's work feel that they're on a sour job, they build up a feeling that they don't want to be there. It would be hard to keep men on that job. It would be hard to keep a foreman. You wouldn't want to come off a job where you had to seek employment someplace else, being on a job that was unsuccessful. In what percentage that would cost, you heard it said the other day it might cost two or three times as much. I think that is very possible.

Mr. Hawkins: I move that answer be stricken, particularly that last comment.

The Court: I think if he wishes to adopt that estimate of two or three times, I'll let it stand as his own opinion.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, you said you thought that was entirely possible. What is your opinion as to whether it would be that, or some other figure? I want to know what your [1284] opinion is.

Mr. Hawkins: Your Honor, I object to asking this witness for a figure. He's testified, I take it, that it would substantially increase the cost, and I don't believe there can be any further answer.

(Whereupon, the reporter read the last part of the last previous answer, as follows: "In what percentage that would cost, you heard it said the other day it might cost two or three times as much. I think that is very possible." and the last previous question.)

The Court: I think under the Court's position here the term "figure" might be objectionable. There is no objection to your asking the extent of the cost, in his opinion, with the understanding that it is only an approximation.

Mr. Olson: I'll reframe it. I wasn't trying to find out a figure, because I know this witness won't——

The Court: I didn't think you intended to elicit a dollar and cents figure.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, referring back to the last part of your answer, where you said you thought it was entirely possible as to those limits of two to three times, will you state what is your own personal opinion, based on your experience and your knowledge of this type of work, as [1285] to what the increase would be?

Mr. Holman: The same objection.

The Court: The record will show the same objection to this as to the prior question.

Witness: That's a terribly hard question to answer.

Q. You understand I'm not asking in dollars and cents.

A. No, I'm not trying to answer it in dollars and cents. I'm not even going to try. Well, this job, with this short explanation I think is correct, this job resolved itself into purely a labor and equipment job; I mean the sub-contractor furnished nothing except a few kegs of nails and some tie wire or something. If this job were one where there would perhaps be as much materials involved as there was labor, the percentage would be greatly different, but it is awful easy to increase your labor cost which would apply on this case, and your equipment cost, from two to three times. I'll let my answer remain two to three times.

(Testimony of Lawrence E. Bufton.)

Q. Now, what in your opinion, Mr. Bufton, would be the effect, if any, of the carrying this job over through the winter of 1944, that is, the '44-'45 winter, rather than getting the job all performed during the summer months?

A. It is always disastrous to carry a construction job over through a winter. [1286]

Q. Will you explain the reasons of why you say that?

A. Well, you have to practically reorganize your job again, and attempt to pour concrete again, maybe have to heat your water, and maybe your aggregates; have to protect it from freezing. The expense of working through a winter is terrific as compared with working through a season under good weather conditions.

Q. Would it be any different in carrying a job of this type over the winter of 1944-1945, say, compared with one of the previous winters we have had, Mr. Bufton?

Mr. Holman: Just a minute. I submit he has not been qualified yet as a weather authority too.

Mr. Olson: I was afraid that's what counsel would think I was asking about. I'm trying not to ask a leading question. I'm not asking about the weather.

The Court: I don't see where the question would be proper at the present time. I'll sustain the objection.

Q. Having in mind the question I just asked, Mr. Bufton, with special reference to the prevail-

(Testimony of Lawrence E. Bufton.)

ing wage scale, is there any difference between the wage scale that particular 1944-1945 as compared to previous——

Mr. Holman: I submit that is an improper question that counsel is asking after your Honor has sustained the objection to the previous question; “having that [1287] question in mind”; he goes on regardless of your Honor’s ruling.

The Court: I think counsel is just trying to direct him. I though he had weather in mind, and he had high wages in mind. I don’t know that it’s been brought out whether this man knows the wage scale.

Mr. Holman: I have this brief objection——

Mr. Olson: I’ll withdraw the question.

Mr. Holman: Very well. I was going to say the contract was in that time, not some other time.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, there has been some reference made to the unavailability of lumber of this type. Now, you referred to the job down in Oregon, the Reclamation job similar to this one. Do you know whether or not lumber was available on that job?

Mr. Holman: Oh, may it please the Court, I object to that question. That’s a comparison between separated areas, and it just can’t serve a useful purpose.

The Court: When was that?

(Testimony of Lawrence E. Bufton.)

Mr. Holman: 1946, your Honor.

Mr. Olson: When was that?

Witness: The job in central Oregon was started in November, 1945. The completion date set for that job was April 30, 1946, in the specifications, I mean. [1288]

The Court: Well, I'm inclined to think that the conditions are not sufficiently similar to indicate the market for lumber on this job, in time and place both. I'll sustain the objection.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, there is also some reference in the testimony to the weight of concrete in this type of structure, as to whether or not there would be any settling of the concrete structure after it was placed in the excavation. What is your opinion as to whether or not such a settling would take place?

A. You could take a column of concrete a foot square, twenty feet high, and set it on that ground out there, if it was undisturbed, and it would not settle.

Q. Would there then, in your opinion, be any settlement of these concrete structures in the excavations such as took place out here on this 1062 as you have observed it?

Mr. Hawkins: Your Honor, if I understand that question correctly, counsel is referring to settling

(Testimony of Lawrence E. Bufton.)

that took place out there on this job 1062. I don't believe there is any evidence of that. Is that your question?

Mr. Olson: I don't think there is either, but then counsel interrogated at some length as to whether or not this concrete would settle some three or four inches and take care of this high grade, unless I mistook [1289] your purpose.

Mr. Holman: He did, your Honor. He mistook our purpose, naturally.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

Witness: No.

Q. Now, do you know, Mr. Bufton, whether or not during the year 1944, between March, 1944, and continuing on to the next year, lumber of the type used in these forms was available or obtainable with a priority?

Mr. Holman: Just a minute. May it please the Court, the witness has already shown that he's a resident and has been an operator in Oregon, and not up here, during that period at all. It is not proper.

The Court: I think the lumber market is general enough in the Northwest here so that he can answer. I'll overrule the objection.

Witness: No question but what lumber was hard to get at that particular time. Priority, of course, would help. The priority on a contract of this sort

(Testimony of Lawrence E. Bufton.)

should have been high, and I think a great deal depended upon what efforts you made to get your lumber.

Q. A great deal depended on what?

A. Depended on what effort was made to get the lumber. A [1290] great deal would depend on what effort was put forth to get the lumber.

Q. Well, supposing that diligent effort was put forth to get the lumber, and the man had a priority; through knowledge of the lumber market, based on your experience, do you think lumber of this type could have been obtained for this project?

Mr. Holman: It seems to me that is purely speculative for this witness. It can't be factual.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

Witness: I think perhaps with some difficulty it might have been obtained, yes.

Q. Now, did you also go over the specifications—I don't mean the specifications—the completed structures on 1068?

A. Yes, I went over the area and stopped and observed a number of the structures on it.

Q. And was that the same time that you examined 1062? A. Same day, yes.

Q. Did you also examine the location of the aggregate stockpile on that job?

A. Yes, I was there.

(Testimony of Lawrence E. Bufton.)

Q. And were those structures of the same general type as [1291] those on 1062?

A. They were.

Q. Having in mind your inspection of the completed structures on job 1068, specifications 1068, and the location of the stockpile with reference thereto as you observed the location, and assuming that the excavations for the structures were to be made by a prime contractor, and assuming that the excavations were made to a lateral clearance at the foundation of the structure of one foot outside and all around the outside line of the concrete, and assuming further that the banks from the foundation of the excavation to the surface of the ground was sloped to a 1 to 1 slope on the banks where outside panels were to be placed to form a structure for the concrete, and assuming further that the floor or foundation of the excavation was so excavated as to be in a position to receive concrete in accordance with the structures as you observed them, and the specifications, and assuming that the excavations were furnished and completed far enough ahead of the concrete work so that the contractor inserting the forms and pouring the concrete could proceed without being delayed, and assuming further that the form lumber was being furnished by the prime contractor and was furnished on time and of a proper quality and as needed by the sub-contractor making the forms, and [1292] assuming further, Mr. Bufton, that the operations to be performed by the sub-contractor on 1068 consisted of

(Testimony of Lawrence E. Bufton.)

furnishing all labor and necessary equipment to do all of the concrete work, form work, structural timber work, cut, bend and install all re-inforcing steel, all such work as shown in the plans and as specified in specifications number 1068, Roza Division, Washington, the sub-contractor to clean all concrete forms, remove nails from the same, and pile the same in neat piles, and all forms and form lumber upon completion of the job to remain the property of the general contractor, the work to be done in strict accordance with the plans and specifications, government inspection to the satisfaction of the general contractor, and all materials except the wire, nails and curing materials would be furnished to the sub-contractor, sub-contractor to furnish the above wire, nails and curing material, and the general contractor to furnish the lumber; and then assuming that the sub-contractor was to be paid \$28.00 per cubic yard for the concrete installed, 2 cents a pound for the re-inforcing steel in place, gates and miscellaneous work to be paid 3 cents per pound in place, and \$35.00 per thousand board feet of structural timber in place, and assuming that the bridges referred to consisted of two small bridges of about 4000 board feet each as shown by the plans and specifications covering [1293] 1068, and assuming further that the total cubic yards of concrete required in the pouring of the structures on 1068 was 1458.339 cubic yards, what in your opinion would be the fair profit, if any, which would or should be realized by the sub-contractor in performing that work?

(Testimony of Lawrence E. Bufton.)

Mr. Holman: I object to that question, your Honor, as having in it many elements of speculation, leaving from it many elements essential to determine the operating cost, many elements omitted with respect to the relative performances between the principal contractor and the sub-contractor, and in addition, I submit that the question is not a proper question, because under the evidence as it now stands before your Honor, the notice of termination was in advance of any excavation, and therefore if there was a termination the matter of subsequent excavations no longer became a matter of any concern or of any right in M. C. Schaefer or the Concrete Construction Company as a sub-contractor.

Mr. Hawkins: I have the further objection, your Honor, that the question of profit is not one that's properly a matter of expert opinion. This witness may be qualified to testify as to the costs, and then it would be for your Honor to make that deduction and arrive at the profit. I submit that that type of question is not properly propounded to an expert.

The Court: The contract here specifies the unit price, of course, doesn't it?

Mr. Olson: Yes, your Honor, and I have specified it.

The Court: And you've specified the amount of yardage?

Mr. Olson: Yes.

The Court: So what you're asking him to do is find what it would cost to do that, and then sub-

(Testimony of Lawrence E. Bufton.)

tracting it from the total allowance is what it would amount to.

Mr. Olson: That's the effect of it.

The Court: I assume this pre-supposes, as in your other question, an experienced and competent contractor?

Mr. Olson: Yes.

The Court: I don't know whether you included that or not.

Mr. Olson: No, I did not, your Honor.

Direct Examination

(Continued)

By Mr. Olson:

Q. In the question there, having in mind that by the use of the term "sub-contractor" I mean a capable and experienced sub-contractor.

The Court: I'll overrule the objections. He may answer.

A. If I can refer to what I looked at a while ago, the [1295] contract; I'm thinking out loud now, if I may.

Mr. Holman: I object to the witness thinking out loud, your Honor.

The Court: Yes, just answer the question, if you can.

Mr. Hawkins: Your Honor, I further object to the witness reading from a memo. I think the rule is that the witness may refresh his recollection, but no more than that.

(Testimony of Lawrence E. Bufton.)

The Court: Yes, that's true. You may use the paper that you yourself prepared to refresh your recollection, but don't read from it.

Mr. Holman: May it please the Court, the witness has already shown that this is not for the purpose of refreshing his recollection, but it is his computation, and it is his computation he made outside.

The Court: Well, I assume an engineer doesn't get these figures right out of the air. If he's figured them, and that is his own figures, I have no objection to his referring to them to refresh his memory or guide him in making his estimate.

Witness: Well, considering the one job alone, that's job 1068, we're talking about, I understand, considering that job alone, the difference in the cost would be so slight that I can't estimate it, I don't think. There [1296] might be some little difference in length of haul that might affect it slightly, but the re-inforcing steel and the gates and metal was placed under the one contract in the contract unit price, and in this one you just read me there it assumes that the contractor will be paid in addition for that. I would say that the cost under those circumstances, for the concrete, without going into what might be made on the small amount of re-inforcing steel or other material, would be \$27.25, which I have estimated would cover home office, general supervision, and a margin——

Mr. Hawkins: Your Honor, I move that answer be stricken as not responsive to the question.

(Testimony of Lawrence E. Bufton.)

The Court: It isn't responsive. I assume that the \$27.25 is the cost.

Witness: Yes, I've made a calculation there of a few cents to cover the items that weren't in this contract 1068 that were in 1062.

The Court: Well, the answer isn't responsive. The question was for profit, and he has stated the price here.

Mr. Olson: No, it is not, your Honor.

Mr. Hawkins: And I also understood the witness to say that this included a margin, of profit, I assume.

Mr. Olson: Yes, it does. I have no objection to [1297] the answer being stricken.

The Court: Yes, it isn't responsive. It will be stricken, and you can start again.

Direct Examination
(Continued)

By Mr. Olson:

Q. What I'm asking you for, Mr. Bufton, on my hypothetical question, is, in your opinion, assuming that the facts are as stated in my hypothetical question, and that the contractor was experienced and able and received the prices which I mentioned in my hypothetical question, and assuming the yardage, the cubic yardage of concrete, as I gave it to you, how much money would it be, if any, in dollars and cents, that he would receive over and above what his actual expenses that he would have to pay out would be, not taking into consideration on his

(Testimony of Lawrence E. Bufton.)

pay-out expenses his own services or supervision, but the difference in dollars and cents between the amount he would receive under that contract, and the amount that he would be required to pay out for labor and materials and equipment?

A. What was the concrete price again, per cubic yard?

Q. \$28.00 per cubic yard, concrete installed.

A. What were the prices on the other units there?

Q. 2 cents per pound for re-inforcing steel in place, gates and miscellaneous iron work, 3 cents per pound in place, \$35.00 per thousand board feet of structural timber in [1298] place.

Mr. Hawkins: While the witness is making the computation, I would like to make this objection, your Honor, that there is no testimony here of the amount of steel required on 1068 or used on 1068. This witness testified he was out to the scene of 1068 within the past week or ten days, and of course it would be impossible to tell from the structures as they now are how much steel was installed. I don't see how anyone could answer that question.

The Court: I don't know, of course, whether that is shown in the structure layout or any of these documents in evidence. Is the amount of steel shown here any place, used on 1068?

Mr. Hawkins: And I assume that the other reasons I stated with reference to the previous question will also apply.

(Testimony of Lawrence E. Bufton.)

The Court: Yes, the record may show that as to all of the defendants, that the same objection goes as to the renewed question.

Mr. Olson: Well, I think it appears, your Honor. May I have the specifications on 1068?

Q. I am handing you, Mr. Bufton, plaintiff's Exhibit 4, which are the specifications on 1068.

Mr. Holman: As corrected, counsel, or not?

Q. No, and also handing you plaintiff's Exhibit 62, showing the final payment quantities with reference to each item shown on the specifications.

A. Well, I'm not interested in quantities in this. I'll take the quantities in the final.

Mr. Olson: Your Honor, if it will conserve time, if counsel wants to proceed with his other cross-examination, the witness can examine that during the recess.

The Court: Well, if it doesn't take too long, he can do it now.

Witness: It won't take but a second here. I can get it here by number. There's something definitely wrong the way this thing's made out here.

Mr. Hawkins: What was that?

A. There's something definitely wrong with the way this is made out.

Mr. Hawkins: What are you referring to?

A. I'm referring to this exhibit here.

The Court: That will be stricken. It isn't in response to any question. What document has he got there, the final estimate?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: The final estimate and the specifications giving estimated quantity. The witness may perhaps be confused. The ink notations on 1062 are to be entirely disregarded, have nothing to do with this exhibit and we [1300] should have those deleted.

Witness: I would estimate that there would be a \$7900.00 margin, out of which you would have to collect home office and general supervision expense.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Bufton, in your consideration of the specifications you said that you read them?

A. Yes.

Q. What specifications did you take into consideration in determining that a slope should be 1 to 1?

A. I'll read it, if you like.

Q. I don't ask you to read it. I ask you what one it is.

A. I'll give you the page number. Page 22, paragraph 47, is that right? I've heard it referred to several times.

Mr. Olson: I think he's entitled to refer to the specification.

Mr. Holman: He may do so.

Mr. Olson: You said he couldn't.

Mr. Holman: He said he'd read it.

A. There is something in here I think you will want to bring out.

(Testimony of Lawrence E. Bufton.)

Q. There is something you think I'll want to bring out, you say?

A. I can make my answer better referring to this. [1301]

Q. I asked you what number.

A. All right, paragraph 47, page 22.

Q. Only? A. In the specifications.

Q. The only one you considered, sir?

A. On the excavation, I'm talking about.

Q. Yes, sir; that the only one you considered?

A. It covers the excavation very thoroughly, I think.

Q. Is that the only one you considered, sir?

A. I'll say so, yes.

Q. All right. Thank you. Did you at any time see any operations on the Roza Project of which this 1062 is a part?

A. Not except these two, not under construction.

Q. That's what I mean, operations?

A. That's right.

Q. You didn't see any operations, sir?

A. No.

Q. Did you take into consideration that there was a back fill item? A. That's pay item.

Q. Sir? A. Back fill as a pay item, sure.

Q. Did you take that into consideration in your answer to counsel in chief. [1302]

A. Why, surely. It's a pay item there, it stands for itself.

Q. Then your answers include determination of that, do they?

(Testimony of Lawrence E. Bufton.)

A. I would say that the back fill there is a pay item which is described in a way, it is prescribed in the excavation specification there, in that the engineer of the Bureau of Reclamation will not measure for back fill, likely, any more than the 1 to 1 slope. In other words, if you take out more than the one to one slope, that part that you put back in there, you'll not get paid for as back fill.

Q. How many times did you read or study this specification here?

A. I've read it through two or three times.

Q. And you say that the back fill item is in Section 47?

A. That Section 47 there as it determines how the engineer is going to figure the back fill of a certain part of that section, there. Now, I don't claim that does all of it. There will be places around these structures where there will be back fill placed higher than the original ground was.

Q. Yes, sir. Did you read anything in the specifications with respect to roads?

A. With respect to roads?

Q. Yes, sir. A. I don't recall. [1303]

Q. Sir? A. I don't recall them perfectly.

Q. You recall no provision with respect to roads?

A. I don't call it to mind right now, no.

Q. Did you read the principal contract?

A. Did I read the principal contract?

Q. Yes, sir.

A. You mean the ones written by the engineers?

(Testimony of Lawrence E. Bufton.)

Q. You know what the principal contract is, do you not?

A. The principal contract is the contract between the prime contractor and the Bureau of Reclamation.

Q. Yes, sir; you read that contract, did you?

A. Yes, sir.

Q. And you read the specifications?

A. Yes.

Q. All right. Did you read specification 70?

A. If I did, I don't recall it.

Q. Pertaining to forms?

A. I don't recall it by that number.

Q. Can you tell me from your best recollections with respect to the specifications covering forms—

A. Covering forms?

Q. Yes, what that specification is?

A. Well, I probably skimmed through that very hastily, having read so many of them in my life.

Q. You don't have that fixedly in mind, do you, sir?

A. I know what's required on forms without reading the specifications.

Q. You don't know or have fixedly in mind what these specifications require as to forms as covered by paragraph 70?

A. I don't have it particularly in mind right now.

Q. Did you read specification 72 with respect to placing concrete?

A. I read it through, yes.

Q. What does it say, from your memory?

(Testimony of Lawrence E. Bufton.)

A. Oh, just the usual specification on placing concrete, that the concrete shall be placed in the forms in such manner as not to—well, in a finished manner.

Q. Was the provision in this specification with respect to placing concrete the same in substance as the one you used in experting the Deschutes job you spoke of? It was Deschutes, was it not?

A. It was very likely the same contract.

Q. You gave a specification number there, did you not, sir?

A. I went over that job, but I wasn't particularly interested in the specifications of the concrete, but I saw the concrete placed over there.

Q. Pardon me, I thought you even called the specifications on this Deschutes job?

A. Specification 1100, yes. [1305]

Q. And that you were familiar with those, and they were much the same as these?

A. Yes, similar project.

Q. In other words, you are familiar with the Bureau specifications? A. Yes.

Q. Then what is the specification with respect to placing concrete, by your memory?

A. Well, concrete placed in the proper manner.

Q. What is the proper manner, sir?

A. The proper manner, the engineer will determine that you put in a given amount of water, not too much water, and the concrete is placed in a manner that will not distort the forms, and then finished in a certain manner that they specify.

(Testimony of Lawrence E. Bufton.)

Q. What was the mix ingredient on this job 1062? A. Sand, gravel, cement and water.

Q. Yes, what proportions?

A. What was the mix?

Q. Yes.

A. I'm not concerned what the mix was, because the cement and sand and gravel was furnished by the Bureau of Reclamation.

Q. You didn't look that up?

A. I say, I'm not even concerned with it. [1306]

Q. Did you look it up?

A. No; I know about what the mix would be.

Q. I want to know with respect to this job. Then with respect to the measurement of concrete, specification 77, what do you have in mind with respect to that?

A. Concrete will be measured on the inside of the forms to the neat measurements of the structure as designed.

Q. That's what you think 77 provides, sir?

A. That's the way it would be measured, yes, sir.

Q. And with respect to payment of concrete, specification 78, you read that, did you, sir?

A. They pay on the price, you're paid on your bid per cubic yard.

Q. Pardon me, sir, did you read 78?

A. I went through them very hurriedly; I can't recall.

Q. Mr. Bufton, on your standing here as an expert at present, did you read and study 78?

A. I did not.

(Testimony of Lawrence E. Bufton.)

Q. And did you read or study 77?

A. I did not; I know what they are so well I don't have to read them.

Q. Did you read or study 72?

A. I did not.

Q. Did you read or study 70?

Mr. Olson: It's hard to understand counsel's [1307] questions when he's pounding the table. I'm having trouble understanding them.

The Court: Well, proceed.

Q. I think the witness and I are getting along very well. Did you read and study specification 52, installing——

A. No; I know so much about it I didn't waste any time on it.

Q. Did you read and study specification 29, roads? A. No, I maybe slipped there.

Q. Did you read and study specification 26, materials to be furnished by the contractor?

A. Yes.

Q. What materials were to be furnished by the contractor, prime contractor?

A. Materials furnished by the prime contractor?

Q. Yes, sir.

A. That will be all materials except those that remain in the finished structure. Do you know what I mean? All the materials that remain in the finished structure.

Q. Is that what Section 26 says, sir?

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. All right; you studied that section, did you?

A. Yes, I know what is there.

Q. Did you read and consider specification numbered 24, [1308] liquidation damages, delay?

A. No, I didn't read that.

Q. You say you went on to 1062 and 1068 with Mr. Darcy, Mr. Waltie, who was here, and Mr. Schaefer. Which Schaefer? A. M. C.

Q. M. C.; when?

A. A week ago last Saturday; that would be February 22, I think.

Q. That would be the 28th?

A. February 22, I'm quite sure.

Q. It was either the 29th or the 22nd, a week ago last Saturday, sir?

A. A week ago last Saturday.

Q. I think you're right, the 22nd, yes. Now, did you find back-filled operations performed on the structures you inspected?

A. I don't quite get that, Mr. Holman.

Q. Did you find back-fill operations performed on the structures you inspected?

A. Yes, yes, they were completed.

Q. What lateral were you on?

A. I couldn't tell you that by number.

Q. Why can't you?

A. Because we didn't follow the map through.

Q. You didn't consult the area map as to laterals? [1309]

A. Not as we went over the job.

Q. That was not with you?

(Testimony of Lawrence E. Bufton.)

A. They had the map in the car, I presume, but the boys would say "this is structure 18, 27" and so forth.

Q. You did not look at the lateral?

A. I looked at the completed structures.

Q. Can you tell me how the laterals are detailed, what determines the number?

A. Certainly I can.

Q. What is it?

A. They've got 59 something or other, then they have laterals A and B and so forth. Ask me to find a structure; I'll find it.

Q. All right, sir; what does 53.7 mean, in reclamation? A. That's mileage.

Q. Mileage on what? A. From a point.

Q. From what point?

A. I don't know what point in this case.

Q. You don't know what point, sir?

A. Not in this case; probably from the head-works.

Q. How much time did you spend in experting the Deschutes job? A. Four or five days.

Q. And did you have mileage designations on those laterals? [1310]

A. Yes, sir, certainly. I was trying to figure out for the bank whether the contractor was making money or not. I had access to his costs.

Q. Pardon me for interrupting you, but the thing I am interested in is whether or not you knew the lateral numbers on these jobs.

A. Why, yes.

(Testimony of Lawrence E. Bufton.)

Q. What laterals were you on, then, sir?

A. We drove over the roads; who could ever remember?

Q. What laterals were you on?

A. I don't know.

Q. And you didn't inquire, sir?

A. I looked at structures of a certain type, and I'm sure I looked at every type that was built, and I am sure I couldn't go out and find them now; neither could you.

Q. Never mind me, it's you I'm questioning. Did you look at an area map?

A. I looked at an area map, yes, sir.

Q. Now, can you tell me from the area map what laterals you were on?

A. If you let me look at the area map I can.

Q. No, did you look at the area map out there?

A. Why, certainly.

Q. Or did you look at such structures pointed out to you by these gentlemen? [1311]

A. I looked at the structures pointed out to me; told me where they were and what they were.

Q. Did you look at the right of way, sir?

A. In a general way, yes.

Q. Why did you do that?

A. I wanted to know how far it was from the central batching plant, and so forth; calculate the average haul.

Q. Mr. Bufton, I understood counsel in his questions to you that you had been to the batching plants?

(Testimony of Lawrence E. Bufton.)

A. I was at the batching plant; I was at the site of both of them.

Q. How far was the batching plant on 1062 from the first operation on 1062?

A. I couldn't tell you that exactly. I figured the average mile haul from the batching plant to all of the structures on 1062 was from $8\frac{1}{2}$ to 9 miles.

Q. $8\frac{1}{2}$ to 9 miles, average haul?

A. That's right.

Q. How did you determine that, sir?

A. From the distance it was from one end, and the haul roads; I wouldn't say that was within a quarter of a mile of being correct, by any means.

Q. No, I understand; a quarter of a mile; which lateral are you talking about?

A. I'm talking about this main lateral, 53.7 or whatever it [1312] is.

Q. I'm asking you, you're talking about the main lateral, which is the main lateral?

A. I don't know, then.

Q. How many structures did you inspect?

A. Oh, probably——

Q. Not probably, sir. How many?

A. I didn't count them.

Q. Did you make notes of the structures you inspected?

A. I didn't make a note of the laterals or structures I inspected, no, I did not.

Q. Did you make notes of the types of the structures you inspected?

A. Mental notes.

(Testimony of Lawrence E. Bufton.)

Q. No, not mental notes; notes on paper?

A. No notes on paper.

Q. The only notes you have made are the computations you have made for these hypothetical questions, isn't that correct?

A. I didn't get the question.

(Whereupon, the reporter read the last previous question.)

A. Not at all.

Q. Do you have any other notes?

A. I had to make other notes to see how many square feet of [1313] form surface; I figured—I went over the map and I figured the length of miles and so forth, from information I had in my mind.

Q. Yes, sir, but did you make any field notes?

A. I didn't make any field notes, no, sir.

Q. Yes, sir; now, your experience as detailed, sir, started out with present operation of a silica plant.

A. That's right.

Q. Where is that? A. Eugene, Oregon.

Q. And how long have you been operating that?

A. Two years.

Q. As owner? A. As principal owner.

Q. A silica plant is for what purpose?

A. Making sand for foundries and other purposes of the sort.

Q. And what is your daily capacity there, sir?

A. Beg pardon?

Q. Daily capacity? A. 50 tons.

The Court: We'll recess now for 10 minutes.

(Short recess.)

(Testimony of Lawrence E. Bufton.)

(All parties present as before, and the trial was resumed.) [1314]

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Bufton, in your computations with respect to your idea of the appropriate unit for concrete on specification 1062, what numbered item of the bid did you consider? A. 1062?

Q. Yes, sir.

A. Just the items that were under discussion here.

Q. What ones?

A. Well, there was concrete, re-inforcing steel, metal gates, and miscellaneous metal work. That was all.

Q. Now, what specifications did you consult, the ones which are in evidence, or did you have other copies? A. I didn't see an addenda.

Q. Sir? A. I didn't see an addenda.

Q. What specifications, the particular copy, did you consult, the ones Mr. Schaefer had or the ones that are in evidence?

A. The ones that he had.

Q. They were on the job with you when you inspected? A. They were.

Q. In your determination of those bid units fixed by you as reasonable for concrete, you used the term "concrete", did you?

A. That's right.

(Testimony of Lawrence E. Bufton.)

Q. What do you mean by concrete? [1315]

A. Well, the materials that are combined, sand, gravel, cement and water, which set up into a stone-like mass, is concrete.

Q. Actually you meant the unit of placing the concrete and the aggregates which is furnished by the government, did you not, sir?

A. Placing them as directed by the Project Engineer, in forms.

Q. By the chief engineer, the engineer in charge?

A. Well, the engineer or his authorized——

Q. Getting back to your one foot square and twenty foot column of concrete having no pressure at the base——

A. I said it wouldn't settle. I didn't say it would have no pressure.

Q. There would be a pressure, would there?

A. There would be a pressure.

Q. A considerable lateral pressure, side wall pressure?

A. That's the very way they test soil; they don't do it with a column of concrete.

Q. There would be considerable lateral pressure, would there not?

A. Just what do you mean by lateral pressure?

Q. Sideways.

A. The earth could hold that up there.

Q. That goes down to China. How about the sideways? [1316]

A. Wouldn't be sufficient so it would crack or spread out, on this soil here, I'm talking about. If

(Testimony of Lawrence E. Bufton.)

you put that on a soft soil, the concrete would go down into it, and the sides would crack.

Q. What is the relative characteristics of the soil on the portion of 1062 that you were on, and 1068? Are they comparable?

A. Very much so.

Q. Same general ingredients?

A. Very much so.

Q. And you being a silica man are entirely familiar with sand?

A. Yes, I know what sand is. They call this Lowe-S, that's a geological name for it.

Q. That is a general classification for all of this type, whether it is ash or sand or has vegetable component?

A. Yes.

Q. Did you make any excavation while you were in the field in any of the soil with any kind of an implement?

A. I did not. There is some gravel out there.

Q. I'm talking about you.

A. No, I didn't make any excavations.

Q. In getting back again to your units you fixed as reasonable for the concrete, did you determine as to whether or not there was any percentage of excess to be considered? [1317]

A. Well, there would be excess to back fill, because it takes more dirt to fill a hole than comes out of it.

Q. I'm talking about concrete.

A. There are certain places, perhaps, where there would be an excess of concrete, because if there was a rock wall or something of that sort you

(Testimony of Lawrence E. Bufton.)

would fill to that rock wall. In other words, you wouldn't try to form it.

Q. Did you consider excess of concrete?

A. The engineers estimate the quantity of concrete.

Q. Yes, as the normal job run. Now, did you consider excess of concrete?

A. As the job runs, the concrete is measurable.

Q. Yes. Did you consider excess, percentage of excess?

A. Well, I heard a man say on the stand here—I just don't know what you're getting at, to tell you the truth.

Q. Never mind what I'm getting at. Answer the questions.

The Court: Do you understand the question?

A. Yes. Nearly always it will take more concrete to do a job than——

Q. Yes, and what did you consider?

Mr. Olson: I'm going to ask counsel to wait for the next question until the witness gets through. Invariably the last ten or fifteen words are superimposed.

Mr. Holman: I just don't mean to offend, naturally.

A. Mr. Holman, I can tell you—— [1318]

The Court: If the witness will try to answer counsel's questions here directly, and then talk one at a time, we'll get along better. If there are explanations to make Mr. Olson, I assume, will bring them out. Just answer counsel's questions if you can.

(Testimony of Lawrence E. Bufton.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. I want to know what percentage of excess in concrete you considered in arriving at this bid price you gave counsel.

A. I didn't take any into consideration.

Q. Why not?

A. I just don't take it into consideration, that's all.

Q. It has to be handled, doesn't it, sir?

A. It has to be handled, yes, if there is any excess. If a man makes up concrete that's not placed in the form he's not going to be paid for it. If he does that excessively, no doubt the government will charge for the materials in it. There is probably a little waste at the end of the day, 'most every day.

Q. That has to be handled, does it not?

A. Surely.

Q. What will that run for a job of this size, in percentage?

A. I wouldn't say over 2 per cent, maybe.

Q. And anything over 2 per cent would be excessive, would it?

A. I would think so.

Q. Would you say that 14 per cent would be wasteful, sir? [1319]

A. I don't know where it happens.

Q. Would you say that would be wasteful, sir?

A. I couldn't explain why it wouldn't be, no.

Q. Would you say it would be wasteful, sir?

(Testimony of Lawrence E. Bufton.)

A. There might be some reason for it. Where do you get the 14 per cent, may I ask?

Q. Let's say 12, so you don't worry about it.

A. Why do you ask me 14, or 12 per cent, either one?

Q. What difference does it make?

A. Is that something that's come up between the engineer, the final payment? I just don't follow it.

Q. Will you please, as an expert——

A. I told you there wouldn't be over 2 per cent.

Q. Having fixed the unit price, tell me whether or not 14 per cent of excess cement——

A. I think I've answered the question.

Q. Let me finish my question, now—is indicative of unskillful operation?

A. I think that when I answered the first question I gave the only answer I could, that there might be 2 per cent waste.

Q. I'm talking about excess; you understand what I mean, sir?

A. Well, you mean excess or waste.

Q. Yes, sir. Now, what percentage of spillage did you consider?

A. Well, I'm talking about spillage. [1320]

Q. Oh, you're talking about spillage?

A. Yes, or you might have a half a yard in your mixer at the end of the day that you couldn't place anywhere, there wasn't any place to place a half a yard. You try to measure it as close as you can when you're batching.

(Testimony of Lawrence E. Bufton.)

Q. Well, all right. What is the fair percentage of skillful operation for wastage?

A. Well, say 5, then; I'm thinking about spillage.

Q. And not very much more than that?

A. That's right.

Q. Very much more than that would indicate something wrong?

A. Well, carelessness, perhaps.

Q. It would indicate carelessness, would it not? In answering your hypothetical question to counsel, did you or did you not take into consideration the perfection or the imperfection of forms themselves?

A. Yes, with the equipment that they had, those cone nuts, which make a spreader and a tightener, you can make your forms very, very close.

Mr. Holman: I move that answer be stricken as not responsive. That isn't what I asked him at all.

The Court: It will be stricken.

Q. What I'm asking you, Mr. Bufton, is whether or not in answering counsel's hypothetical questions you considered the forms might themselves be defective? [1321]

A. No, I did not.

Q. And if they were defective would that change your answer?

A. Well, if the forms were defective it certainly would.

Q. All right, sir. Did you make inquiry to ascertain whether or not the forms were defective?

A. I don't know who I might have inquired from.

(Testimony of Lawrence E. Bufton.)

Q. Now, please tell me, did you or did you not?

A. No, I didn't.

Q. Did you consult government records as to excess of concrete?

A. I did not.

Q. Did you determine from any records whatsoever that there were vertical cuttings on the job in question, or did you assume that from what you heard?

A. Vertical cutting of what, a bank, do you mean?

Q. I'll make it explicit, sir.

A. Pardon me; maybe I'm dumb.

Q. I don't think you are, sir. What I'm talking about, of course, is excavation.

A. There are vertical banks that are prescribed in these specifications.

Q. Yes.

A. Yes. As to how the banks they're talking about, as being sloped 1 to 1, or vertical, I only have hearsay for that. [1322]

Q. Yes, I understand that, sir; and as to the distance of the bank out from the base of the neat line of the concrete, pay quantity, is that based on hearsay too, sir?

The Court: This witness never testified, did he, that the banks were vertical or what the slope was?

Mr. Holman: I'm trying to find out what he investigated.

The Court: Well, how could he investigate as to whether the slope was one to one? He just examined it ten days ago, didn't he? I can't see any purpose at all in this line of examination.

(Testimony of Lawrence E. Bufton.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. You say that a job which carries through the winter is a more expensive operation? A. Yes.

Q. Than one that carries through the construction months? A. Yes.

Q. Is it or is it not good practice to suspend operations in the months of May, June and July, in the Pacific Northwest area, including the Roza Project? A. I would say no.

Q. And if work is suspended during that period, it is reasonable to contemplate, is it not, that it will have to be done in the worst months, the more unfavorable months? [1323]

Mr. Olson: Your Honor, that's asking for a conclusion of the witness.

Mr. Holman: Well, I'm talking about a job this size.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Your Honor, you see, the first question was——

Mr. Holman: I'll strike the question. I think it is argumentative, your Honor, and I didn't mean to make it so.

(Testimony of Lawrence E. Bufton.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you determine what priority for lumber was involved on 1062?

A. I had so many of those numbers in my mind at one time, I haven't any idea what they are now. I did not.

Q. You had been told for these jobs the priority, had you?

A. No, I don't know what the priority was.

Q. And when your answer was that if they had priority, you meant a top priority, did you not?

A. Not necessarily. I say that priorities helped. I didn't say what priorities.

Q. They would help you, sir, and you recognize that priorities at that time were necessary? [1324]

A. Yes, I did.

Q. Did you know from your investigation in connection with your testimony here on this stand, or from your investigation in connection with your experting the Deschutes job which you mentioned, that during the interim while 1062 and 1068 were in progress there was a shortage of lumber?

A. Certainly there was.

Q. Yes, sir; and that there was a withdrawal of requirement of kiln-dried lumber on all public jobs, did you know that, sir?

A. Well, that means you couldn't get air dried lumber.

(Testimony of Lawrence E. Bufton.)

Q. Yes. Withdrawal of the requirement. You've had a lot to do with contracts, haven't you?

A. Yes.

Q. Wasn't that waived, sir?

A. I don't know whether that was true or not, sir.

Q. You didn't know anything about that, sir?

A. No; during that period of time I didn't buy any kiln-dried lumber.

Q. Now, getting to 1068, Mr. Bufton, how many structures on 1068 did you inspect?

A. I can't tell you what number.

Q. How many laterals were you on on 1068?

A. I can't tell you that.

Q. Can you tell me the numbers of any of the laterals? [1325]

A. I cannot.

Q. How long were you on 1068?

A. I said that I was on the two jobs about six hours.

Q. Yes; how many of the six hours were you on 1068?

A. Well, I think probably two and a half of the six hours.

Q. Two and a half of the six hours, on 1068?

A. Yes.

Q. And the rest of the time, three and a half, would be on 1062?

A. I think so. We went over and looked at the chute.

Q. How did you know you were on 1062?

A. Because they told me I was.

(Testimony of Lawrence E. Bufton.)

Q. How did you know you were on 1068?

A. They told me I was.

Q. No government engineer located you on there? A. No.

Q. Then so far as you are concerned it could have been 1062-2 or 1101 or some other specification, could it not?

Mr. Olson: I think that question is argumentative, your Honor. He answered the question.

The Court: Yes, that is argumentative. Sustain the objection. He said he doesn't know where he was except where they showed him.

Q. Did you have these pictures which are in evidence when you were in the field inspecting, sir?

A. They had a field map which we looked at, and they showed me the general terrain there.

Q. No, I meant these photographs, I think counsel showed you a Mixomobile on the photographs; it is exhibit 49. A. Yes.

Q. You had that with you, did you?

A. I've seen those pictures, yes.

Q. Did you have those with you in the field, sir?

A. I'm not sure we did, sir. It seems to me I did see a picture of someone in the field.

Q. Did you have the series of pictures?

A. Well, he had it in some kind of binder. It may not have been that one.

Q. Do you remember what pictures they showed you? A. No, I don't.

Q. Isn't it a fact they showed you the picture in which a Mr. Hewitt was shown?

(Testimony of Lawrence E. Bufton.)

A. I've seen that picture. I did not see that one out in the field.

Q. And didn't they show you that structure?

A. Well, if they did they didn't mention it.

Mr. Holman: Yes, sir. That's all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Bufton, I believe you testified that this job 1062 could be accomplished so far as the sub-contractor was [1327] concerned in four months, was that your testimony?

A. That that job should have been done in four months, yes. I answered a hypothetical question, if it is proper for me to qualify it, I answered a hypothetical question when I said four months.

Q. With respect to 1062? A. Yes.

Q. Did you take into consideration in answering that question the roads, or the condition of the roads?

A. Yes, I know what the roads are like in this country.

Q. I meant out there on 1062. A. Yes.

Q. And if in fact the movement of their equipment was held up by the condition of the roads, would that have an effect on your answer?

A. They don't need to be held up.

Q. My question is, if in fact they were held up?

A. Well, I didn't take it into consideration in making my answer.

(Testimony of Lawrence E. Bufton.)

Q. In other words, in making your answer you assumed that they could move their equipment around freely, without difficulty?

A. You take care of your roads so that you can move your equipment. You have a Patrol grader, something like that.

Mr. Hawkins: Will the reporter read my question? [1328]

(Whereupon, the reporter read the last previous question.)

Q. Is that right, sir?

A. Well, there would be difficulty. You would have to prepare your road for it.

Q. Just a moment. I think you can answer that question.

A. You can't take a piece of equipment and drive it through the country as nice as you can on a paved highway.

Q. In making your answer did you assume that that equipment could be moved around freely and without difficulty? A. No, I did not.

Q. In other words, you assumed that they would have difficulty in moving their equipment around, is that right?

A. That's right, there would be some difficulty, yes.

Q. Mr. Bufton, I believe you heard the testimony that this Mixomobile had a capacity of two yards? A. The drum has two yards.

Q. At a time? A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And a capacity of about 20 to 30 yards per hour? A. Yes.

Q. Is that right? A. Yes.

Q. Can you tell us—well, let's see, first, how many structures were on 1062, if you know approximately? [1329] A. Something over 500.

Q. Something over 500, and there were approximately 1,500 yards of concrete involved?

A. That's right.

Q. That would make approximately three or three and a half yards per structure?

A. If you figure it that way. There is structures like the chute and transition, and so forth, that there was some 300 odd yards of concrete in the structure.

Q. There was 300 yards in the chute?

A. The chute and the transition section, and the settling basin.

Q. All right, you eliminate that 300, that gives you about 1,200 yards for the 500 structures, is that right?

A. Yes, average; I mean, that's the total, yes, should be.

Q. So that you would have approximately two and a half yards per structure?

A. That would be average.

Q. Yes, the average. Now, do you think it is proper to have a machine that has a capacity of 30 yards per hour out there in that area to pour structures that contained only 2 yards?

(Testimony of Lawrence E. Bufton.)

A. Yes, and let me tell you why: That machine is a rubber-tired, self-propelled piece of equipment. They don't make them in a smaller size. If you went out with a piece of [1330] equipment smaller, not self-propelled, you would have more difficulty than you would with this machine here.

Q. You would have to move it with some other vehicle?

A. Yes, it would cost you more than this self-propelled vehicle.

Q. In your opinion it would cost more, is that right?

A. Yes, I've done it, and I know.

Q. Now, if you were handling this job, how many men would you have on the job?

A. Well, if I was going to finish up in four months I'd have to have an average of 25 men.

Q. An average of 25 men?

A. Yes.

Q. And how many men would you have doing carpentry work, building panels at the yard?

A. Well, when I started out I would probably have a fair sized crew, and afterwards, I'd have a crew there of probably three or four men.

Q. And how many men would you have out setting the forms?

A. Setting forms? 5.

Q. About 5 men?

A. Yes.

Q. And how many men would you have pouring concrete?

A. 4, and a finisher would be 5.

A. Yes.

Q. 4 and a finisher, or a total of 5 men?

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And in connection with setting the forms, you would expect to do a certain amount of shovel work, hand shovel work, would you not, sir?

A. That's a question that I'm not going to answer here, because there is a conflict of what two contractors should do. Now, that's a matter of whether I agreed to do some excavation, I would expect to do some excavation; if I had not agreed to do it, I would not do it.

Q. Pretty clearly there is a difference between excavation and doing a little trimming with a shovel in order to get your form set, isn't there?

Mr. Olson: I think that's a matter——

The Court: I'll overrule the objection.

A. That is a matter of quantity, I'd say.

Q. And also the type of equipment used, too, isn't it, sir?

A. You mean equipment for what?

Q. An excavation job normally contemplates power equipment, does it not?

A. This job here couldn't be accomplished with power equipment.

Q. It had to be completed by hand, didn't it?

A. It had to be completed by hand, yes. [1332]

Q. Now, this soil is sandy to a considerable degree, is it not? A. Yes, sandy loam.

Q. And after an excavation is complete a certain amount of sand will drift down into the excavation, will it not?

A. If your slopes are right, there might be a little blow in, or something of that sort.

(Testimony of Lawrence E. Bufton.)

Q. And the flatter the slope the more blow in?

A. Well, might be a little blow in.

Q. And in dropping your forms down in the excavation a workman might cave in the lip?

A. If you have your excavations on a 1 to 1 slope there would be very little danger of that.

Q. Even on a 1 to 1 slope a workman might kick down where the form is to rest?

Mr. Olson: I object to asking the witness to speculate as to what might possibly happen.

The Court: Overruled.

A. Oh, I suppose a workman might, surely.

Q. And if he did, he would have to do some shovel work, wouldn't he?

A. Yes, he would have to shovel it out.

Q. Then it would be expected, would it not, that the men setting the forms would have shovels there, hand shovels?

A. Well, I would certainly have a shovel on the job, yes. [1333]

Q. And then you would expect the form setters to do a certain amount of shovel work, wouldn't you?

Mr. Olson: I think that's argumentative.

Mr. Hawkins: I'm asking for his opinion. I don't think I'm arguing at all.

The Court: I'll overrule it.

A. If I had a contract with somebody who had agreed to——

Mr. Hawkins: Just a moment, sir. Your Honor, this is not answering the question I asked.

(Testimony of Lawrence E. Bufton.)

The Court: I think he has answered it that he would expect to do some shovelling if the dirt fell in.

Q. Yes; now then, I believe you estimated that the troubles which Mr. Schaefer had on this job, or which he contends he had on this job, as enumerated by counsel in his hypothetical question, would result in 1062 costing from two to three times as much as it should cost?

A. Yes, that would be very possible on this job.

Q. Did you take into consideration the fact that Mr. Schaefer actually had on the job not to exceed 12 men at a time?

A. That's something that I can't answer at all.

Q. Now, just a moment; I submit, Mr. Witness, that you can answer it. Would you read it?

Mr. Olson: I'm going to object on the ground it is assuming a state of facts not in the evidence, 12 men on the job. I don't know of any testimony to that [1334] effect, that Mr. Schaefer never had more than 12 men on the job.

Mr. Hawkins: I think it is giving the evidence the benefit of the doubt. I think the testimony is there were two on excavation, and two or three on panel work, and another man using a gunny sack, or sacking, or whatever it is called. The payroll is in evidence, is it not? Plaintiff's 52, your Honor, shows that.

The Court: Well, I'll overrule the objection.

Witness: May I ask that the question be read again, please?

(Testimony of Lawrence E. Bufton.)

(Whereupon, the reporter read the last previous question, as follows: "Did you take into consideration the fact that Mr. Schaefer actually had on the job not to exceed 12 men at a time?")

Q. Did you take that into consideration in giving your opinion? A. I don't see—pardon me.

Q. Did you take it into consideration?

A. I said to do the job in four months—wait a minute, I'm off the beam. I beg your pardon. You're talking now about when I said it might cost two or three times as much?

Q. Was that your testimony, that it might cost two or three times? [1335]

A. I got myself mixed up. You're talking about my having made the remark that it might cost two to three times as much, and then taking into consideration that Mr. Schaefer had only 12 men on the job; I can easily take that into consideration this way——

Q. I'm not asking you to take it into consideration at this time.

The Court: Just a moment. I may be mistaken about this, but it is my recollection of the testimony that he didn't testify that Mr. Schaefer's expenses were two or three times as much as it would have cost under ideal conditions. He testified that taking into consideration the various elements counsel mentioned here, that under the hypothetical state of facts, it would cost two or three times as much. Did he ever testify as to what Mr. Schaefer's costs were?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: No. I don't think he's in a position to.

Q. Very well, I will strike my question, then. Mr. Bufton, in giving your opinion to a sub-contractor——

Mr. Holman: May it please the Court, for the purpose of the record, in view of the fact that counsel has stricken his question, I noted that he called this book Exhibit 52. Now, I understand that is only an identification, and has not been admitted. In other words, I am [1336] concerned with having the record identify that as an exhibit.

The Clerk: It is identification 52.

Mr. Hawkins: I stand corrected.

The Court: The record will show, then, that it is an identification, and not an exhibit.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Bufton, in giving your opinion that the cost would be two or three times as much if a subcontractor had the difficulties that counsel enumerated in his hypothetical question to you, did you take into consideration the number of men on the job?

A. I didn't know how many men were on the job.

Q. You didn't know how many men were on the job?

A. No.

(Testimony of Lawrence E. Bufton.)

Q. How many men would you expect to be on the job under those circumstances?

A. I said if it was done in four months it would take an average of 25 men per day.

Q. An average? A. Yes.

Q. In some cases it would be more than 25 men?

A. Yes, it might vary.

Q. At the start there would be considerably more than 25?

A. There should be, theoretically, but it might be difficult [1337] to do that.

Q. No, I'm not concerned about that right now. You would have more than 25 at the start of the job, is that right, sir?

A. Well, the very start of the job you would have less, then you build yourself up to perhaps more than 25, then as your crew got trained you probably might have less than 25 afterwards.

Q. And what would be the maximum number of men you would have on the job in order to accomplish this? A. Probably 30 or 32.

Q. 30 or 32? A. Yes.

Q. And if in fact there were never more than 12 men on the job, you would not expect to get the job accomplished in four months, would you?

A. I couldn't.

Q. In estimating the profit on 1068, you assumed a competent and efficient sub-contractor?

A. Right.

Q. If in fact that sub-contractor had shown a material loss on a similar contract the year preced-

(Testimony of Lawrence E. Bufton.)

ing, through improper operations on his part, you would not expect that sub-contractor to make a profit on 1068, would you?

Mr. Olson: Just a minute. If I understand that [1338] question right, your Honor, that is certainly assuming something that is not in the evidence. I wonder if I could have it read?

The Court: Yes, all right.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Now, if your Honor please, I object to that as assuming a set of facts not in the evidence or referred to in the evidence. It is argumentative in its form, and asking for a conclusion that does not relate to any issue involved in this case.

The Court: I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. I believe you testified that it was always disastrous to carry on a contract over the winter?

A. Always expensive, too.

Q. Well, I think you said always disastrous.

A. Pardon me, I didn't quite get you. You had your hand up over your face.

Q. Always disastrous, is that your testimony?

A. Depends on the type of work, of course. It costs more in the wintertime than it does in the summer. There might be a class of work under cover where it wouldn't cost a bit more.

(Testimony of Lawrence E. Bufton.)

Q. Wasn't your testimony it was "always disastrous"? [1339]

A. I was thinking about the particular type of work, outside work it is disastrous.

Q. You had in mind outside work?

A. Yes.

Q. Now, with reference to this Deschutes job, that was outside work? A. That's right.

Q. And it was carried on over the winter?

A. In December and January they had protected their concrete, heated their water, and it cost more money. They had 3500 yards of concrete to place between the 1st of November, you might say, and the 30th of April.

Q. And you ascertained that they were making a profit on that contract, did you not, sir?

A. Yes.

Q. Then it is not always disastrous to carry on a contract over the winter, outside?

A. Well, it costs more money; perhaps state it that way.

Q. In other words, when you said it was always disastrous, to carry on a contract over the winter, all that you meant was that it would probably cost more money?

A. Yes, it is disastrous if it does cost more money.

Q. Beg your pardon?

A. It is disastrous if it does cost more money, to a contractor. [1340]

(Testimony of Lawrence E. Bufton.)

Q. That again would depend on what he was being paid for his work, is that right?

A. I didn't get that question.

Q. Again it would depend on what he is being paid for his work?

A. He may contract for something that he has to do in the wintertime, and set his price to take care of it.

Q. Now, you've examined exhibits 23 and 25, have you, sir? A. 25?

Q. Those are those two models over there, model excavations. A. I've seen them.

Q. In all of your experience have you ever seen an excavation like Exhibit 23?

A. I'll have to be sure of what you're talking about.

Q. This one is Exhibit 23.

A. I never saw one so nicely done as that in my life.

Q. And in all of your experience have you ever seen an excavation like Exhibit 25?

A. Yes, I can visualize how that could have been done.

Q. Just a moment——

A. I mean, I've seen that sort of thing done, yes.

Q. You've seen excavations such as that?

A. Oh, yes.

Q. Now, with reference to Exhibit 23, would it be possible to pour the structure that's set in there, marked Exhibit [1341] 24, in one pour?

A. Surely.

(Testimony of Lawrence E. Bufton.)

Q. What about this bank, Exhibit 23a, would that cave in when the concrete was poured on top of it? A. Where?

Q. Bank 23a.

A. You protect yourself against that. I said I never saw an excavation as beautifully done as that. That's what you're asking me.

Q. No, I didn't. I'm asking whether you expect 23a to cave in when you pour this form?

A. If I did, I'd put a board down there.

Q. Now, just a moment, would you expect that to cave in?

A. I might even allow it to cave in a half a foot or something.

Q. You're an engineer, you've had vast experience in pouring concrete. I'm asking you just this simple question, would you expect 23a to cave in?

A. No, I wouldn't. Absolutely not.

Q. In your opinion is it proper to pour concrete upon a vertical bank as a foundation?

A. Why, sure.

Q. That's perfectly proper?

A. I've done it on the inside of the hole too.

Q. Whereabouts, sir. [1342]

A. I'll have to take this out to show you. This bank here had to be graded perpendicularly, up and down, and a form came here; there was no form on this side at all; there was no form here.

Q. That's perfectly true; you had this entire bank to support that concrete wall, did you not, sir?

A. Why, sure.

(Testimony of Lawrence E. Bufton.)

Q. What would be supporting 23a?

A. That little spot down there?

Q. Yes. A. This dirt right here.

Q. And what would keep 23a from collapsing and caving?

A. You throw a shovel full of dirt up against that.

Q. You would fill that in with dirt?

A. When the first concrete came down there I'd take a shovel and throw dirt up against it.

Q. In other words, the proper way would be to crib that slope?

A. This is a theoretical slope, mind you. There is nothing that requires you to do that perfectly. The reason, when you get a place down in the bottom where you have to throw it up by hand——

Q. You expect to throw dirt in there?

A. I would flatten that slope flatter than that.

Q. You would expect to throw dirt up from the bottom when [1343] setting these forms?

A. I would expect I ought to, because I couldn't dig it with the equipment I had.

Q. You would expect to do some shovel work when you set the forms?

A. Somebody had to; I'm not saying who.

(Whereupon, a portion of Exhibit 3 was marked 23b.)

Q. Now, with reference to 23b, that's just what I might call a clean cut in the dirt. You do not have a wood form up against 23b, do you?

A. Not at that point there, no.

(Testimony of Lawrence E. Bufton.)

Q. The concrete is poured directly against 23b?

A. Let me understand exactly what you mean; at this spot here 23b, the concrete is poured directly against this wall in the earth.

Q. And in pouring the concrete might not dirt be knocked down in there?

A. You have an inspector right there watching pretty close to see that it didn't.

Q. It might happen?

A. Could happen, yes. He might make you take it out.

Q. If the dirt did fall down there, he would require you to stop pouring, would he not?

Mr. Olson: That certainly asking for speculation [1344] of this witness.

A. I can explain this.

The Court: All right; overrule the objection.

A. This inside form which would be the one in here, see, would be hung so at the depth of that floor, perhaps 8 inches, there would be 8 inches open, and you would get in there before you start pouring concrete at all, and you start pouring one of them right down that wall, if you know what you're doing.

Q. All right; now, if you knock dirt down into the space between the form and the bank marked 23b, good practice would require you to remove that dirt before you made any further pour?

A. You just wouldn't do it in that case. Your bank would be all right when you started to pour; you would pile up; you wouldn't start pouring down there.

(Testimony of Lawrence E. Bufton.)

Q. If you do knock dirt in there you have to stop the pour and remove that dirt?

A. If the engineer makes you stop it.

Q. Now, in pouring concrete against that dirt wall, the type of dirt that you saw out there when you were visiting it the other day, is not there a good chance that that dirt would fall down?

A. In very dry weather some of that dirt would fall down and you have to clean out a little of it there on the [1345] bottom right where you're pouring; you would have that twelve inches down there to clean out.

Q. Excepting for very dry weather——

A. In damp weather that stands up very nice.

Q. You can make a vertical bank that will stand up under concrete pour out there on 1062?

A. That is my belief, anyway.

Q. While we're here, with respect to vertical excavation, if an excavation is 18 inches to 2 feet from the neat line of the concrete wall, vertical, is that not adequate in order to place your forms and remove them?

A. I'd never do it that way myself.

Q. I'm not asking what you would do. I'm asking if that would not be sufficient in order to place your forms and remove them.

A. Well, let's figure it out; you've got about 9 inches of timber, 8½ perhaps, and I'm talking about your sheeting, your studs, your strong-backs, then you've got your rod that sticks out there another three or four inches, perhaps. A

(Testimony of Lawrence E. Bufton.)

man would have to have 18 inches plus room enough to work. If it is a vertical bank I would say he'd have to have 3 feet.

Q. He'd have to have 3 feet from the vertical bank, in your opinion? A. Yes. [1346]

Q. Regardless of the depth of the excavation?

A. Why, yes, sure; what difference would that make?

Q. I'm asking you.

A. That's right, pardon me.

Q. If the structure is only 4 feet deep, you believe that the vertical excavation would have to be 3 feet?

A. I would say not quite, but he still has got to have room to stand; yes, he's darn near got to have the same room.

Q. He'd have to have three feet clearance from the neat line of the concrete wall?

A. Yes, to work efficiently.

Q. Of course, 1 to 1 slope you don't have a 3 foot clearance?

A. No, but you've got that slope to work on.

Q. If you're working on that she-bolt on the bottom you're crowded, aren't you?

A. On a 1 to 1 slope?

Q. Yes.

A. Yes, but I say that she-bolt doesn't go down to about a foot or more from the bottom. If you've got a foot here, you've got two feet or better.

Q. Just two feet?

(Testimony of Lawrence E. Bufton.)

A. Well, if it was just a foot from the bottom of the concrete, you'd have two feet horizontal, it would be.

Q. That is, two feet from the neat line; not two feet from [1347] the strongback.

A. No, I said it would be equal to having two feet of horizontal clearance from the neat line of the concrete.

Q. As a matter of fact, you would have only about a foot from the strongback, and less than that from the she-bolt? A. That's right.

Q. It is your opinion that with a vertical excavation you have to have a three-foot clearance from the neat line of the concrete?

A. To work efficiently.

Q. Do you know whether it would be possible to use a bulldozer on a job such as 1062?

A. Pardon me, I didn't hear that.

Q. Do you know whether it would be possible to use a bulldozer on a job such as 1062?

A. Yes, it would.

Q. In your direct examination I believe you testified it was impossible to cut a vertical bank with a bulldozer, is that right, sir?

A. That's right.

Q. Do not the specifications in this case call for vertical banks in some instances?

A. It does; as I say, you have to do part of this job by hand. You don't dig any vertical banks with a bulldozer.

Mr. Hawkins: You may take the witness. [1348]

(Testimony of Lawrence E. Bufton.)

Redirect Examination

By Mr. Olson:

Q. Mr. Bufton, have you been here throughout this trial?

A. Well, quite a bit of the time; too much.

Q. Beg your pardon?

A. Yes, I've been here quite a bit of the time.

Q. Were you here the beginning of the trial, the first day?

A. I was here the morning it opened.

Q. And have you been here every day since, that the trial has been in session?

A. No, I haven't been here every day that the trial was in session.

Q. I don't mean right in the courtroom, but I mean in Yakima.

A. I went home last Friday. I wasn't here in the court last Friday, and I don't think I was last Thursday afternoon.

Q. Mr. Bufton, handing you plaintiff's Exhibit 3 and Plaintiff's Exhibit 12, I am referring to counsel's question asking you whether or not in the examination of the structural layout plans and the specifications whether or not you inspected and examined the original exhibits in court, or whether you had examined others; I will now hand you a book entitled "Specifications No. 1062, earth work, pipe lines, and structures, laterals 59.3 to 69.8 and sub-laterals" and ask you to examine that and tell [1349] me whether or not the specifications which you examined are the same as plaintiff's Exhibit 3?

(Testimony of Lawrence E. Bufton.)

A. By the title page they must be the same.

Mr. Holman: Mr. Olson, if you say so, I don't make any point on that, and I didn't with the witness; I had no intention to with the witness.

Mr. Olson: That's all I want to show. The record shows that the witness didn't examine the same.

The Court: If there is no question about it, let's don't take any time on it.

Mr. Holman: The only thing, your Honor, I had in question, Mr. Olson's accountant and the accountant I had here were going to put the correct units in exhibits 2 and 3, but it has not been done, and the only thing I was concerned is whether or not he was considering these figures in here, which are erroneous, and he said he did not, so I was not concerned with it.

Mr. Olson: Your Honor, that point had just as well be taken care of. I'm a little confused with reference to what obligation is on who. I have now put into evidence the final pay estimates, which include in them, as testified by Mr. Keller, the bid price. Now, is there—do you want more than that?

Mr. Holman: Well, in order to have them identical I would respectfully ask that the Clerk be permitted to [1350] put the bid prices in from the exhibits, 61 and 62, is it?

Mr. Olson: I think that's it. What I have in mind, there is a place here for the contractor to calculate his bid. I think as far as 1062 is concerned they're in there right.

The Court: 1068 is the one that are not in there?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: I think they're wrong, and they should be deleted, the ink figures on the schedule there should be deleted.

The Court: I see.

Mr. Holman: Mr. Olson, I have checked Exhibit 3, that's 1062, and it is complete.

The Court: Why not have the clerk, then, delete these in the other exhibit.

Mr. Holman: Strike out those that are in at present, your Honor, because that was evidently used to figure some other job; has nothing to do with this job at all.

Mr. Olson: That's what I understand. That's all the questions I have.

The Clerk: On that same matter, before we leave this, do you mean by striking out, with a red pencil lining through the figures, would that be sufficient?

Mr. Holman: I think so, or I would like to have inserted in here the figures from the other exhibit.

The Court: Do you care to undertake that?

The Clerk: That's O.K.

The Court: Both counsel then agree that Mr. LaFramboise shall insert the correct figures in this exhibit?

Mr. Olson: Yes.

The Court: If he has any doubt about it, you had better direct him, both of you, so there won't be any question about the figures.

Mr. Olson: I take it the figures will be taken from the Bureau of Reclamation's final estimate, Exhibit 62.

(Testimony of Lawrence E. Bufton.)

The Court: What is the one from which you're striking, then?

Mr. Holman: Plaintiff's Exhibit 4.

The Court: All right, Mr. Holman.

Recross-Examination

By Mr. Holman:

Q. I forgot to ask you, Mr. Bufton, I believe you said that a transit mixer was an impractical method of pouring concrete for forms on reclamation jobs?

A. No, I didn't say that, Mr. Holman.

Q. Pardon me, you didn't. I believe your statement was in substance the Mixomobile was better?

A. Yes.

Q. That's right; thank you; and your reason was that the transit type of mixer, which revolves the aggregates as [1352] it travels——

A. In transit.

Q. ——has to discharge its whole batch at one pouring, is that correct?

A. No; perhaps you misunderstood me.

Q. You mis-spoke yourself, then, sir. I just couldn't follow you.

A. It has to be all discharged before you take it back to the batching plant again. You might pour out half of the batch here and then take it over and pour out the other batch there, but you wouldn't take it back to the plant before you discharged the whole batch.

Q. But the rotary drum holding the aggregates

(Testimony of Lawrence E. Bufton.)

and mixing them as the unit travels from the batching plant to the form—— A. Yes.

Q. ——will be mixing that aggregate?

A. Yes.

Q. And saving time there, will it not?

A. Yes.

Q. And then when it gets to the form for pouring, if that form requires less than the full amount of that batch, it can take the rest of that back, mix in more aggregate, and go on to another form, could it not? A. That's right.

Q. Now, if you have two transit mixers instead of one Mixomobile, [1353] those can be passing and accelerate the pour, can they not?

A. You miss my point, though.

Q. Never mind your point, sir. Can't that be?

A. They can be passing.

Q. You could double your efficiency with two transit mixers? A. Yes.

Q. As against one Mixomobile? A. No.

Q. Why not?

A. Because one Mixomobile is on the job all the time. You're feeding that with the number of trucks that you want.

Q. It has to go back for those aggregates, does it not?

A. Yes, but when that batch truck gets there, he has enough materials to make three cubic yards of concrete.

Q. That has to be auxiliariated, then, with another truck? A. Sure.

(Testimony of Lawrence E. Bufton.)

Q. With your transit mixer, it itself gets the aggregates and mixes them on the way?

A. Yes.

Q. So that time is saved?

A. There is time saved, but you're hauling half as much material.

Q. Is that good or poor economy on this kind of job?

A. Either one can be used. I said the mixer was the more [1354] economical.

Q. Is it good or poor economy to use a transit mixer on this job?

A. If you say poor economy, I say it's poorer economy than the Mixomobile, but not only that, the Buggymobile——

Q. How far apart did you understand that these holes were?

A. Well, if you want to average it back, that's the best I could do, I presume the structures are probably a thousand feet apart; maybe not that much, maybe more than that.

Q. And the advantage of agitating the aggregates and the cement with the water en route would not expedite the job as against bringing it there and then taking the time to mix it on the job?

A. No.

Q. Why not?

A. Because you've got one man and a piece of equipment that cost twice as much, or more, perhaps, in the transit mixer than you have in a truck that's hauling twice as much concrete material. If you're going to haul that equipment all

(Testimony of Lawrence E. Bufton.)

the time, back and forth, you're hauling a mixer to your job and back to your plant every time you take a batch out there, aren't you?

Q. Mr. Bufton, isn't it a fact even from your own experience that the Mixomobile type is used for something where there is line production?

A. They use it everywhere.

Q. And that the transit mixer is the unit type usually used where there is sporadic pouring?

A. I have used both.

Q. Isn't that a fact?

A. In my opinion, that's all I can tell you, if I were going to do this job, and I owned transit mixers myself, and I owned Mixomobiles and Buggymobiles, I would use the Mixomobile and Buggymobile, because I would know that I could do it more economically than I could with the transit mixers. Now, that's the best answer I can give you.

Mr. Holman: That's all.

The Court: Mr. Hawkins?

Mr. Hawkins: I have no further questions.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Monday, March 10, 1947, at 1:30 o'clock p.m.) [1356]

Yakima, Washington, March 10, 1947

(All parties present as before, and the trial was resumed.)

L. R. HENDERSHOTT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. L. R. Hendershott.

Q. And how do you spell your last name?

A. H-e-n-d-e-r-s-h-o-t-t.

Q. Where do you live, Mr. Hendershott?

A. Aloha, Oregon.

Q. Is that close to Portland, someplace?

A. About 15 miles west of Portland.

Q. What is your occupation, Mr. Hendershott?

A. A certified public accountant.

Mr. Holman: Your Honor, I move that the answer be stricken as not based upon the best evidence.

The Court: It will be denied.

Q. How long, Mr. Hendershott, have you been engaged in the accounting business?

A. I have been practicing as a principal for two years, and about 11 years altogether.

Q. How long altogether? [1357]

A. 11 years.

(Testimony of L. R. Hendershott.)

Q. And how long have you been a Certified Public Accountant?

Mr. Holman: Again I object, your Honor, as not the best evidence.

The Court: Overruled.

A. Since I believe it was April, 1944.

Q. Are you now practicing your profession and maintaining an office for that purpose?

A. I am.

Q. Mr. Hendershott, as a certified public accountant did you examine the books and records of the Concrete Construction Company relative to expenditures made by it in connection with specifications 1062 of the Roza Project? A. I did.

Q. And did Mr. Schaefer or the Concrete Construction Company make its books and records available for your inspection? A. They did.

Mr. Hawkins: Your Honor, I move that that answer be stricken. It is obviously based on hearsay.

The Court: He's just stating what he had as the basis of his examination, isn't he?

Mr. Hawkins: I understand that the witness testified that all of the books of the Schaefer company relating to 1062 had been delivered or made available to him, and I don't see how this witness can testify as to that. [1358]

The Court: I didn't assume that he testified it was all the books of the company. He said that certain books were given to him, and he made his examination on that.

(Testimony of L. R. Hendershott.)

Mr. Olson: I said the Concrete Construction Company made available its books and records.

The Court: I'll overrule the objection.

Direct Examination

(Continued)

By Mr. Olson:

Q. Would you state, Mr. Hendershott, what records you did examine in connection with 1062?

A. Well, there was the retained copies of the certified payrolls, and their general payroll records, original vendor's invoices as pertaining to materials and job sundries, the general books of original entry, and the general ledger of the company.

Q. When did you make this audit, or complete it, Mr. Hendershott?

A. My letter to Mr. Schaefer was dated November 26, 1945, and that was within a few days after I had completed the work.

Q. Did you make up a written audit and report to Mr. Schaefer covering your audit?

A. I did.

Q. Do you have a copy of that with you?

A. Yes, I have. [1359-1360]

(Whereupon, carbon copy of statement of costs was marked Plaintiff's Exhibit No. 63 for identification.)

Q. Mr. Hendershott, showing you plaintiff's identification 63, I'll ask you to state what that is.

A. That's a carbon copy of the costs as shown

(Testimony of L. R. Hendershott.)

by records of the Concrete Construction Company on the Roza Project, job number 1062, and my letter of transmittal.

Q. Did you also, Mr. Hendershott, at my request, have some copies of your audit, exclusive of your letter, printed up? A. I did.

Q. Do you have those with you?

A. Yes, I have.

Q. And are those printed documents true and correct copies of the one that you typed up, being plaintiff's identification 63, exclusive of the letter?

A. Yes, they are.

Mr. Olson: Your Honor, I thought that as a matter of convenience, I see some of them don't have these.

The Court: You may pass the copies around, then, if you wish, to the court and other counsel.

Mr. Olson: It is all on one sheet; it is a little easier to follow.

Q. Now, Mr. Hendershott, what is the first item that you [1361] show on your audit?

Mr. Hawkins: Your Honor, this hasn't been offered in evidence yet, or admitted in evidence. I don't think it is proper to interrogate to the items until it is admitted.

The Court: Yes, it doesn't seem to me that the contents should be gone over until it is offered in evidence. Was your purpose to have him show what this is now in order to lay the foundation for its admission, or do you wish him to testify as to its contents?

(Testimony of L. R. Hendershott.)

Mr. Olson: I was going to go through it. When I offered it previously I think counsel's objection was I hadn't gone over the contents first. It makes no difference to me. I'll offer the identification in evidence now.

Mr. Holman: Your Honor, I wish to render this objection to the acceptance of the exhibit as evidence: In the first place, for the reason already indicated, that L. R. Hendershott, the witness on the stand, has not produced any of his credentials or authority to serve as a Certified Public Accountant. The testimony of the witness fails to show where he claims to be a Certified Public Accountant, and under what authority he claims to be a Certified Public Accountant. The letter of transmittal and this compilation, at least I assume it is the [1362] same thing, was made as Exhibit A to the amended answer and cross-complaint of the plaintiffs in this litigation, in this suit, and with reference to the transmittal letter to Mr. M. C. Schaefer and signed by this witness, there is no representation therein and there is no certification therein of the correctness of this as an audit whatsoever. This witness has not given this compilation the authoritative certification which a Certified Public Accountant must do, and therefore it becomes no more than a summation of an individual's ideas of what the books and records of someone else as carried on, and it is therefore based on hearsay, and it is wholly irrelevant, incompetent and immaterial; my point specifically being, your

(Testimony of L. R. Hendershott.)

Honor, that this is not, nor does it purport to be, a Certified Public Accountant's audit.

The Court: Well, it is offered, isn't it, as an audit of an expert in accounting. Is there any particular magic about the Certified Public Accountant's audit and his certification, that makes it admissible in evidence? I'm just asking you.

Mr. Holman: I have this in mind, your Honor; at least in the State of Washington, and I presume this gentleman is in the State of Oregon, although it hasn't been said, at least in the State of Washington a Certified Public Accountant is licensed, and the best evidence is [1363] the production of his license.

The Court: That would be true of an engineer, too, wouldn't it? We don't ordinarily make an engineer bring in his diplomas and his licenses to practice. A man is usually permitted to get up and tell what his expert field is, without producing documents.

Mr. Holman: That is correct, and yet this purports to be a certified compilation by this accountant, and my point is, it is not so certified.

Mr. Hawkins: I would like to point out that nominally an audit entails a sending out of letters to the creditors, and an actual check of the inventory on hand by the Certified Public Accountant or someone under his direction. It entails an actual personal check of the various creditors of the subject corporations or the subject being audited. This is not an audit in the true sense of the word "audit" at all. It is merely a summation

(Testimony of L. R. Hendershott.)

by an expert in the accounting field of what the books of the Concrete Construction Company show.

The Court: Is it your contention that this is not admissible?

Mr. Hawkins: It is my contention that a proper foundation has not been laid for the admission of this in evidence.

The Court: In what way? [1364]

Mr. Hawkins: In that the books and records of the Concrete Construction Company are not in evidence; the parties who prepared those books have not presented themselves for cross-examination, to show where they got the figures, how and so on; all we have here is a summation by this gentleman, admittedly an expert, let's say that he is a Certified Public Accountant, for the purpose of argument, of what the books of the Concrete Construction Company show. We have nothing here concerning those books; we have nothing to show how those books were prepared, or by whom or in what manner the figures were obtained, and I submit, therefore, that the proper foundation has not been laid for the admission of plaintiff's identification 63.

The Court: Perhaps you had better go into the qualifications of the witness a little more thoroughly. There might be some question about that part of it. It seems to be questioned here.

Mr. Olson: Do you mean as to whether or not he is a Certified Public Accountant?

The Court: Yes, and his experience as an accountant, although he stated that in a general way.

(Testimony of L. R. Hendershott.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, Mr. Hendershott, how actively have you been engaged in accounting and as an accountant during the past 11 [1365] years, as I understand you have been working at it?

A. For the time up until I took the examination and received my own certificate I worked in the office under the guidance of another Certified Public Accountant.

Q. What kind of work were you doing, Mr. Hendershott?

A. Well, 'most anything in the accounting field is gone into in an office over a period of years; auditing of various kinds, installation and maintenance of bookkeeping systems, income tax work.

The Court: Where is he a certified public accountant?

Q. Where are you a Certified Public Accountant?

A. Licensed in Oregon under the jurisdiction of the American Institute of Accountants.

Q. And when you become a Certified Public Accountant, is that under State, or is that national?

A. The examination is prepared by the American Institute and submitted, I believe, to 46 of the 48 states. An examination is taken in each of those states on the same day, and all papers are

(Testimony of L. R. Hendershott.)

sent to New York to the main office of the American Institute for correction and for grading.

Q. Is it true, then, that to become a Certified Public Accountant in Oregon or Washington that the same examination is taken?

A. Exactly the same. [1366]

Mr. Holman: Just a moment; I submit the witness is not shown qualified to answer as to the laws of other states; at least he's asking about Oregon and Washington both.

The Court: Well, he should know what is necessary to become a Certified Public Accountant, and I'll overrule the objection.

Mr. Holman: Also I would like an objection on not the best evidence; the law is the best evidence, your Honor.

The Court: Overruled.

A. (Witness) Oregon and Washington give the same examination, and if you hold a certificate in one state and change your residence to the other, they will reciprocate.

Mr. Holman: I move that answer be stricken for the same reason, your Honor.

The Court: Denied.

Direct Examination
(Continued)

By Mr. Olson:

Q. And now, since you've had your own office, Mr. Hendershott, how long is it you've maintained your own office?

A. Two years, or a little over two years.

(Testimony of L. R. Hendershott.)

Q. And during that time what has been the nature of your work?

A. Well, largely installing and supervising the keeping of records in various offices. [1367]

The Court: What do you get when you become a Certified Public Accountant, a certificate?

A. A Certificate.

The Court: Do you have a certificate?

A. Here's my license.

Mr. Olson: Would you mark this for identification?

(Whereupon, Hendershott's C.P.A. license was marked Plaintiff's Exhibit No. 64 for identification.)

Mr. Olson: We'll submit a copy of it. I understand that he'll want that with him, no doubt. I wasn't going to deprive you of it permanently, Mr. Hendershott.

The Court: Who issues the license?

A. The State Board of Accountancy.

The Court: I suppose we could take a deposition down there of the State Board, or some member of it.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hendershott, showing you plaintiff's identification 64, I'll ask you what that is?

A. Well, this is the receipt that we receive annually at the time we pay our dues to the State

(Testimony of L. R. Hendershott.)

Board of Accountancy, and is an annual license certificate.

Q. And what period does it cover?

A. From July 1, 1946, to June 30, 1947.

Mr. Olson: We offer plaintiff's identification 64 [1368] in evidence, with the request that we be authorized to substitute a copy of the same.

Mr. Hawkins: We have no objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 64 for identification was admitted in evidence.)

Q. Are you authorized to appear before the Treasury Department, to practice as an agent before the Treasury Department of the United States, Mr. Hendershott? A. Yes, I am.

Q. Now, Mr. Hendershott, did you answer what work you had been doing, the nature of the work, during the two years that you've been operating your own office?

A. I have installed several bookkeeping systems, cost accounting systems, and supervised the office procedure in a number of different firms.

Q. Now, is plaintiff's identification 63, Mr. Hendershott, a true and correct audit of the books, records and invoices of the Concrete Construction Company with reference to expenditures made as shown by those books, records and invoices in regard to specifications 1062 of the Roza Project?

A. Mr. Olson, before I answer that, I think that there should be a little clarification of the term "audit", if I may. [1369]

(Testimony of L. R. Hendershott.)

Mr. Hawkins: I would like to have the witness explain that term. I think it has a special meaning in accountancy.

The Court: Well, I think what we want the witness to do is explain what this identification is, and what it represents, and if he has to define "audit" to do that, I think it is all right for him to do it.

Witness: In the accounting practice there are several different types of audits. There is the complete audit, which is the type Mr. Hawkins made reference to in his objection a while ago, where you get confirmations from creditors and customers as to accounts owing or owed to the firm. There's a balance sheet audit, in which you go into the various items on the balance sheet of a corporation or any business, and determine whether or not the items stated on the balance sheet are equitably stated, and are worth the amount of money as shown by the balance sheet; or there is a special purpose examination, in which you may take only a portion of the records of a company to determine some specific result, as pertains to one particular portion of their operation, and that is not customarily referred to as an audit, because insofar as that portion of their operation is concerned, there may be no relationship, other than in a general way, between that and the general records of the company. I [1370] think that if Mr. Olson will refer to this as an examination, it will be a little more accurately stated.

Q. Well, we'll avoid all that, Mr. Hendershott, by asking you to state what that plaintiff's identification 63 is. You made it, now state what it is.

(Testimony of L. R. Hendershott.)

A. It is a recapitulation of the original documents as pertaining to this one particular job, with the exception of the overhead item, which is of course based upon general operations.

Q. And those original records that you spoke of, were they in your possession during this examination?

A. They were in my possession then, and are still in my possession.

Mr. Hawkins: Again I renew my objection and move it be stricken, because hearsay is inherently involved in it. This man is testifying that original records are in his possession. He would have no way of knowing they were original except by statement of one of the Schaefers.

The Court: I'll overrule the objection. He says they are the records from which he made this examination. Where are they, here?

A. They are.

The Court: They are available to the other side if they care to go into them? A. They are.

The Court: And this is a summation of those documents you have? A. That's right.

Mr. Olson: I understand he has them in his briefcase.

The Court: All right; I just wanted to know that they are available.

Mr. Olson: We renew our offer.

The Court: Same objection?

Mr. Holman: Yes.

(Testimony of L. R. Hendershott.)

Mr. Hawkins: We make the same objection.

The Court: Overruled; it will be admitted.

(Whereupon, Plaintiff's Exhibit No. 63 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Will it be more convenient to you, Mr. Hendershott, to follow on this exhibit itself, or on the printed one?

A. I think the printed form.

Q. Now, taking the first item shown on plaintiff's Exhibit 63 of Labor, would you explain what that is, what it represents, and how it was arrived at?

A. That is the total of the labor shown on the retained copies of the certified payrolls submitted on job 1062.

Q. Now, you have various columns here; would you explain what each column indicates, Mr. Hendershott? [1372]

A. Those are the months in which labor was expended, or in which all these expenditures have occurred during the course of the work.

Q. The 1944 and 1945 indicate what?

A. And that's the years in which the various months fall.

Q. And the column on the extreme right of the Exhibit 63 indicates what?

(Testimony of L. R. Hendershott.)

A. That is the total for the job. That is a cross total of all the columns.

Q. So, then, the total labor is what figure?

A. \$53,280.87.

Q. Now, that figure was obtained from where, Mr. Hendershott?

A. From the retained copies of the certified payrolls.

Q. Now, your next item is what, and how was it arrived at?

A. That's the payroll insurance to the State of Washington, Department of Labor and Industries, I believe, based on .024 cents per man hour worked.

Q. And how did you arrive at the figures shown thereon?

A. That is a computed figure taken from the totals shown on the certified copies of the payrolls of the man hours.

Q. And that makes a total of how much on this job? A. \$831.64.

Q. Now, your next item is what?

A. That's payroll taxes, 4 per cent.

Q. Explain that. [1373]

A. Which is made up of State of Washington unemployment, 2.7 per cent, Social Security, Federal old age benefit, 1 per cent, Federal Excise Tax of 3/10 of 1 per cent, based upon the amount of labor shown in each of the various months, and a total for the job of \$2131.21.

Q. All right, now your next item is what?

A. Truck hire.

(Testimony of L. R. Hendershott.)

Q. And explain that item, and give the amount.

A. That was the amount paid for rental of a truck on the job site, in the amount of \$2919.96.

Q. Now, on your examination and on this exhibit that you have prepared, Mr. Hendershott, is that and each of the other items broken down into months? Are they broken down into months, the amount expended each month?

A. Yes, they are.

Q. Now, what is your next item?

A. Next item is equipment rental in the amount of \$14.00.

Q. Do you happen to recall what that item was?

A. I believe that was to Benton County for rental of a bulldozer.

Q. Rental of a what?

A. Of a bulldozer, I believe.

Q. All right; now, what's your next item?

A. Small tools.

Q. And what does that consist of? [1374]

A. That represents, oh, such as shovel handles, hammer handles, repairs of small hand tools, and replacement of expendable tools.

Q. And the amount of that is how much?

A. \$196.31.

Q. Now, your next item?

A. That's equipment repairs and maintenance.

Q. What items go to make up that heading?

A. That's repairs and maintenance of equipment that is on the job. That is made up of repairs that

(Testimony of L. R. Hendershott.)

were made on the equipment while those pieces of equipment were at Roza.

Q. I didn't get the last part of your answer.

A. I say, that is repairs on the equipment while it was on the Roza project, in the amount of \$1761.78.

Q. All right; now, your next item?

A. That's gasoline, which would be for the trucks, mixer, cars, that were on the job. That is \$1990.69.

Q. And your next item?

A. Is oil for the same equipment, \$83.98.

Q. And the next item? A. Is form oil.

Q. Do you know what that is?

A. It was my understanding it was the oil used on the forms to facilitate the removal and to leave better structures; [1375] the amount is \$99.92.

Q. And the next item you show is what?

A. Is hardware; that includes nails, she-bolts, and miscellaneous hardware that was required to be furnished by the Concrete Construction Company.

Q. And that amount totals——?

A. The amount is \$405.18.

Q. Now, your next item?

A. Metal pipe plugs, which were sheet metal cones made up to use on the job. The amount was \$83.50.

Q. All right, your next item?

A. Was Hunt Process and Sealcure, \$431.80.

Q. Do you know what that is, Mr. Hendershott?

(Testimony of L. R. Hendershott.)

A. I know what I've been told, but I don't think that's good.

Q. Your next item is what?

A. Sisalkraft paper.

Q. Do you know what that is?

A. When I inquire as to why it was used on the job, it was used as——

Mr. Holman: Oh, I object, your Honor, as to any reasons.

The Court: I think that would be hearsay.

Q. I just wondered if he knew of his own knowledge. All right, what was the amount expended for that? A. \$69.60. [1376]

Q. All right, the next item?

A. Is batching, which is the mixing of the aggregate, \$2780.62.

Q. The next item?

A. Lumber for cement shed, \$2.60.

Q. And the next item?

A. Is roofing for the cement shed, \$23.50.

Q. All right; now, your next item is travel?

A. Travel.

Q. And what's the total amount shown opposite travel? A. \$67.57.

Q. And what does that item consist of?

A. That was expense accounts of various ones of the Portland people that came on the job.

Q. All right; now, you have an item of miscellaneous. Would you give the amount of that?

A. Miscellaneous is \$144.21.

Q. And what, in general, does that cover?

(Testimony of L. R. Hendershott.)

A. Well, there was rental of a post office box at Sunnyside, telephone calls between Sunnyside and Portland, films and developing on pictures, first aid supplies; I noticed several snake-bite kits.

Q. Several what? A. Snake-bite kits.

Q. Snake-bite kits? [1377] A. Yes.

Q. Anything else you can recall that you have in that item?

A. No, not in particular. I think that pretty well covers it.

Q. Now, the next item?

A. Is the premium on the bond, \$393.90.

Q. What bond was that?

A. Performance bond to the Glen Falls Indemnity Company.

Q. Now, your next item?

A. Engineering expense, Mr. C. E. Hewitt's account.

Q. And the next item?

A. Is legal expense, \$533.57.

Q. Whose account is that, or do you know?

A. I believe that was Mr. McKelvey's account.

Q. Now, those amounts total how much, Mr. Hendershott? A. \$68,447.66.

Q. And what type of cost do you designate those? A. Those are direct costs.

Q. And by that you mean what?

A. Costs pertaining to that particular job alone, and not having any bearing on the other operations of the company.

(Testimony of L. R. Hendershott.)

Q. Now, your next item shown on your exhibit, being plaintiff's Exhibit 63, is what?

A. That's overhead expense. It was based on 20 per cent of the direct cost. The total is \$13,582.82.

Q. What relation does that figure have to \$68,-447.66? A. That represents 20 per cent of it.

Q. Now, in connection with your examination, Mr. Hendershott, what examination, if any, did you make to ascertain the actual relationship between Mr. Schaefer's overhead costs for this particular job and the other jobs which Mr. Schaefer had operating at the same time?

Mr. Holman: That, your Honor, I object to as immaterial and outside of the issues. In other words, Mr. Schaefer's other operations manifestly cannot be used to determine an overhead cost for this job.

The Court: Well, what he's trying to get at is what proportion, if any, this job should bear to the total overhead. Overrule the objection.

Witness: On the trial balance of the general ledgers of the company, which is, of course, a recapitulation of the entire year's business, I took the total expense items shown on the ledger, deducted from it the items of direct costs as covered by this recapitulation, and applied the remaining overhead to those direct costs, and determined a percentage which the general overhead bears to the total direct costs on all jobs done during the year by the Concrete Construction Company.

(Testimony of L. R. Hendershott.)

Mr. Holman: I make the same objection, your Honor, and move that the answer be stricken.

The Court: Denied.

Q. And what did you determine by that computation, Mr. Hendershott?

A. For the year of 1944 the percentage was 37.05 per cent, and for the first five months of 1945 the percentage was 19.66 per cent. Taking the total of the 17 months, the percentage was 30.54 per cent.

Q. Well, then, you have charged on your statement against this job only 20 per cent?

A. 20 per cent, yes.

Q. Would that mean that you have charged to overhead on this job more, or less, than what your computation showed was actually attributable to the job?

A. I've charged a third less than the actual overhead incurred during the period the job was in progress.

Q. Now, then, in your exhibit did you total those two figures?

A. Yes, that makes a total of \$82,030.48.

Q. Before we go to this, Mr. Hendershott, in this overhead expense, 20 per cent of direct cost, is there any item included in that for Mr. Schaefer, that is, a drawing account?

A. Yes, in the general overhead there is a monthly salary set up for Mr. Matt Schaefer.

Q. And how much is that? [1380]

A. \$325.00 a month.

Q. \$325.00 a month?

A. Yes.

(Testimony of L. R. Hendershott.)

Q. Explain how that charge relates to this particular project, or how much of it, or whether or not all of it is charged to this Roza Project job.

A. Well, the total costs on this job, direct costs, are \$68,447.66, and the total direct costs on all operations during that same period are \$189,113.16, and that is roughly, the Roza Project represented roughly 31 or 32 per cent of the total direct costs, therefore about 31 or 32 per cent of Mr. Schaefer's salary would be included in that overhead figure; I mean around \$100.00 a month.

Q. Well, now, do I understand that of Mr. Schaefer's drawing account of \$325.00, that there is charged to this job 30 some per cent instead of the 20 per cent? I wasn't quite clear.

A. Well, the pro-ration of the expense on this job, I mean the pro-ration of the direct costs of this job to the total direct costs of all operations represents about 31 or 32 per cent on this job. However, there is another point to be taken into consideration, that is, that I didn't charge on this job the full amount of the overhead as shown by the statement; as shown by the books, I should say. [1381]

Q. Well, how did that affect this \$325.00 a month?

A. Well, had the whole entire 30 per cent overhead been charged against this job, then approximately \$100.00 a month of that \$325.00 would be charged to this job.

Q. Then how much have you actually charged to this job?

A. I'd have to figure it out; I don't know.

(Testimony of L. R. Hendershott.)

Q. Did you use this 20 per cent figure?

A. I used the 20 per cent figure, yes.

Q. You mean in order to give me the exact amount in dollars and cents you would have to figure it out?

A. Yes, that's right. There would be some small proportion of it.

Q. Now your profit, 10 per cent, will you explain that figure?

A. That is 10 per cent of the total direct and indirect costs. The overhead is regarded as indirect cost. It is 10 per cent of the total of the direct and indirect costs; it amounts to \$8203.05.

Q. And that makes a total figure of how much?

A. \$90,233.53.

Q. And that figure represents what in your examination, Mr. Hendershott?

A. I don't understand the question.

Q. What is that figure supposed to indicate, as far as your examination? [1382]

A. That's the total costs, including profit, on the job.

Q. All right. Now, your payments received is your next item shown there. How much did the books and records show had ben paid?

A. \$32,614.66.

Q. Now, you've got another figure there, another column, "retained percentage." Would you explain that?

A. That's the 10 per cent of the monthly estimates which was retained by the prime contractor.

(Testimony of L. R. Hendershott.)

Q. Did you give the amount there?

A. No; \$2939.46.

Q. All right; now explain your next computation.

A. The accumulated balance due without retainage is the difference between the \$90,233.53 and \$32,614.66, in the amount of \$57,618.87.

Q. And your next item is what?

A. Is interest at 6 per cent on the accumulated monthly balances, computed to November 1, 1945, I believe—yes. Computed to November 1, 1945, in the amount of \$3,745.57.

Q. What rate of interest did you figure that at, Mr. Hendershott?

A. One-half of 1 per cent a month, or 6 per cent per annum.

Q. Then your next and final figure there, "Total due Concrete Construction Company from Macri and Company," \$61,364.44, represents—— [1383]

Mr. Holman: Your Honor, I move that that portion of the exhibit be deleted and stricken, as the conclusion of the witness upon the very matters that are determinative before this Court. I have in mind the exact wording of that. There's nothing above it, may it please the Court, that shows anything about Macri and Company at all, then they wind up with the label that this is due the Concrete Construction Company from Macri and Company.

The Court: I think that wording is an objectionable conclusion. I think the figures may stand there.

(Testimony of L. R. Hendershott.)

Mr. Holman: Yes, but I'm talking about that label.

The Court: Strike out everything but the word "total" or "balance" or something of that sort.

Mr. Olson: Well, that is our contention, that it is due from Macri and Company. I don't think your Honor in reading this is going to be misled. That is our position. Counsel's position is to the contrary. I don't wish to offend counsel.

The Court: Well, it isn't mis-leading, but I think it is objectionable if it is objected to, and it is.

Mr. Holman: Wouldn't the word "total" or "balance" do?

The Court: Yes, I think so, and strike out the rest of it. I think the wording to which Mr. Holman had reference is the wording on the last item appearing at the [1384] bottom of the left hand side, that reads "Total due Concrete Construction Company from Macri and Company." Just strike out everything following the word "total."

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Hendershott, the item of \$61,364.44, which will now appear as being opposite the word "total," what does that figure then indicate?

A. That is the total unpaid cost on the Roza Project, 1062, including interest to November 1, 1945.

(Testimony of L. R. Hendershott.)

Q. All right; now, getting back to your figure of payments received, \$32,614.66, did your examination reveal, Mr. Hendershott, whether or not those were payments all made direct to Mr. Schaefer, or does it include payments made for his account?

A. All the payments listed with the exception of the \$3018.41 in the column headed "May 1 to November 1" were received by Concrete Construction Company. That item of \$3018.41 were payments made for the account of Concrete Construction Company to various vendors, by Macri and Company.

Q. Now, under your item of miscellaneous, did I understand you to say that that item included some film and developing?

A. Film and developing and printing.

Q. And what else did you say that included?

A. Telephone, post office box, first aid supplies.

Q. Are your records available in such shape, Mr. Hendershott, that you could give us the breakdown on that one item?

A. No, they're not right now. I can in a half hour or such a matter after I'm off the stand.

Q. I'd like to have you, before we get through here, Mr. Hendershott, give us the breakdown on that.

The Court: Is that on the miscellaneous item?

Mr. Olson: Yes. You may examine.

Mr. Hawkins: Your Honor, I wonder if we could reverse our order of examination?

The Court: Yes, all right.

(Testimony of L. R. Hendershott.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Hendershott, these books that you prepared this statement from, who gave them to you?

A. They were given to me by the bookkeeper in the office of the Concrete Construction Company, at the instruction of Mr. Schaefer.

Q. Do you recall the name of the party that gave them to you? A. Charley Boone.

Q. And when did he give them to you?

A. Within a short time prior to November 26, 1945.

Q. And you say they were given to you at Mr. Schaefer's direction? A. Yes.

Q. Were you present when Mr. Schaefer gave Mr. Boone that [1386] direction?

A. Yes, I was.

Q. And Mr. Schaefer told Mr. Boone to give you the original records pertaining to 1062?

A. He told Mr. Boone to give me all the records pertaining to 1062, and any other information which I requested.

Q. Did you request any other information?

A. Yes.

Q. And you obtained that information from Mr. Boone, did you not? A. I did.

Q. And the statement that you've given here is based in part, at least, upon that information which Mr. Boone gave you?

(Testimony of L. R. Hendershott.)

A. I mis-understood your first question, Mr. Hawkins. When I meant that I asked for additional information, I asked for additional records.

Q. Additional records? A. Yes.

Q. And Mr. Boone furnished those records to you? A. He did.

Q. And your statement here, plaintiff's Exhibit 63, is based in part at least upon those additional records?

A. Upon additional records which I requested.

Q. Yes, and the only way that you know that these are the original records is Mr. Boone told you so, isn't that [1387] right, sir?

A. Most, or a big percentage, of the invoices are from firms in this general locale, and bear notations and signatures of people that were on the payroll on this job, as having been received by them and approved.

Q. You're familiar with all of those signatures, are you?

A. I'm not a handwriting expert, no.

Q. No. That is, this payroll and these other documents were furnished to you by Mr. Boone?

A. That's right.

Q. And he stated to you what they were?

A. That's right.

Q. And it is upon his statement that you make the statement here in court that these are the original records of the Concrete Construction Company? A. To my best belief, they are.

Q. Your belief, however, is founded upon Mr. Boone's statement?

(Testimony of L. R. Hendershott.)

The Court: If there is any serious question about these being the original records of the Concrete Construction Company, can't Mr. M. C. Schaefer get on and say they are?

Mr. Olson: In my order of proof I have that down, to have him so testify. I can again put him on out of order. [1388]

The Court: Let's not waste a lot of time on cross-examination to show that those are the original records.

Mr. Hawkins: I'm sorry I'm prolonging or making an unnecessary cross-examination.

The Court: I'm not saying it is unnecessary at this stage; perhaps we can shorten it by showing that they are original records.

Mr. Olson: I have in mind putting him on.

Mr. Hawkins: That may be. I just want the record to show at this time that Mr. Hendershott's knowledge is based upon information furnished by Mr. Boone, and his knowledge is based upon what Mr. Boone said they were. If counsel is unable to establish the originality of these records, it might be of benefit to my client.

The Court: I'm not questioning the propriety of your examination at this stage.

Mr. Olson: They are original records, and of course it is obvious that Mr. Hendershott wouldn't have any personal knowledge except from Mr. Schaefer.

Mr. Hawkins: That's what I want to get in the record. That being in the record, that's fine.

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Hawkins:

Q. Now, Mr. Hendershott, with reference to this item of miscellaneous, you have in there post office box and telephone. Now, normally, aren't those two items generally [1389] listed under overhead expense?

A. That is a post office box at Sunnyside, at the job location.

Q. And the telephone, someone told you that was the telephone at Sunnyside?

A. That is long distance calls only, between Sunnyside and Portland.

Q. I see. Now, then, with reference to the item of film, I take it that's in connection with these pictures that were introduced in evidence here?

A. I assume so.

Q. Is that right? And this engineer expense item, I take it that is in reference to preparation of this case for trial?

A. That's Mr. Hewitt's statement.

Q. Yes, and do you know whether that was in connection with the actual performance of a job?

A. No, I don't know definitely that it was.

Mr. Olson: Your Honor, if it will shorten that, we'll concede that figure to Mr. Hewitt was for his

(Testimony of L. R. Hendershott.)

services in making the examination to which he testified in court.

The Court: That's \$201.25?

Mr. Olsen: Yes.

Q. Now, with reference to the item of legal expense, do the [1390] records show that is in connection with the preparation of this case for trial?

A. It is for legal advice during the time this job was in progress.

Q. Do you know the dates that that legal advice was rendered?

A. No, I don't know, offhand.

Q. Do you have the original bill in your file?

A. I believe I have.

Q. Could you secure that without too much difficulty? Not right now, but I mean later?

A. Yes.

Q. Will you do that, sir? A. I will.

The Court: I wonder if it might not be wise for the witness to make a note of these things? There may be a good many requests. Here's a pad.

Q. Now, in figuring this overhead you've taken a flat percentage of 20 per cent? A. Yes.

Q. Is that common in the concrete industry, or how do you arrive at that figure?

A. No, it is customary in making a cost statement to take the actual overhead of the concern. It just so happened that in this instance that to me, this 30 per cent seemed unusually high, because there hadn't been enough work [1391] during the

(Testimony of L. R. Hendershott.)

period this job was in process to balance the fixed overhead.

Q. Now, what do you mean by 30 per cent? Where did you get that figure?

A. That's the pro-ration of the overhead expense to the direct costs on all jobs throughout the operation, during the period from January 1, 1944, to May 31, 1945.

Q. Of the Concrete Construction Company over all of its projects?

A. Over all operations.

Q. I see.

A. And there was another point in arriving at that 20 per cent——

Q. That is, the whole thing was 30 per cent?

A. That's right.

Q. The actual overhead cost was 30 per cent of the direct costs of all operations?

A. That's right.

Q. Do you have the records of all operations here with you?

A. I have the general ledger; trial balance of the general ledger, I should say.

Q. The original records, however, you don't have them?

A. Yes, the original trial balance.

Q. But I'm referring to the books of original entry, let me put it that way. [1392]

A. Yes, I have.

Q. Of all jobs?

A. I have—beg your pardon, not the individual

(Testimony of L. R. Hendershott.)

job costs on all jobs. I have the general ledger and the purchase journal and the cash receipts and disbursements and so forth, that go to make up the original records of the company.

Q. That's what I was getting at. You have those books which summarize? A. Yes.

Q. But you don't have with you the books of original entry?

A. Those are the books of original entry.

Q. Your ledger is, sir?

A. I didn't say ledger. I said the purchase journal, cash receipts and cash disbursements are the books of original entry in any business.

Q. Yes; and you have those here with respect to all jobs? A. I have.

Q. And you cut down this figure to 20 per cent, is that right, sir? A. Yes.

Q. And that was done on the theory that 30 per cent was too high? A. It is.

Q. And how did you arrive at that conclusion, sir? [1393]

A. Well, for one thing, 20 per cent was the overhead used by Mr. Schaefer in making up his original estimate on this bid on this job.

Q. Is that where you got the 20 per cent figure?

A. That was one thing that governed my judgment that 20 per cent was adequate.

Q. And is 30 per cent out of line in the industry?

A. I would say that in the construction industry 30 per cent overhead is out of line, yes.

(Testimony of L. R. Hendershott.)

Q. And would indicate inefficient management?

A. No.

Q. Not necessarily? A. No.

Q. It might, however?

A. It would indicate that the jobs that they happened to get involved in did not allow them to operate in an efficient manner, and that they couldn't expend the direct costs in proportion to the facilities that they had, over a period of time.

Q. In other words, it would indicate that something was wrong some place.

A. Something was wrong, definitely.

Q. Now, then, with reference to this 10 per cent profit, how did you arrive at that figure, sir?

A. Most cost plus jobs are cost plus 10; that is customary. [1394]

Q. That is the reason you selected 10 per cent here? A. That's right.

Q. Because most jobs in the construction field are cost plus 10 per cent? A. That's right.

Q. In connection with the 10 per cent item, that was not based on any previous experience that Mr. Schaefer had? A. No.

Q. In the concrete business?

A. If you mean whether that was based on his previous operations had netted 10 per cent, no, that didn't have any bearing on it at all.

Q. That had no bearing?

A. However, it had been their practice in the past to bill on the basis of cost plus 10 per cent.

Q. Well, when he did bill or bid on cost plus

(Testimony of L. R. Hendershott.)

10 per cent, did he include his overhead expense in his cost? A. Yes, he did.

Q. That was not the actual direct cost plus 10 per cent?

A. Not direct cost, no; that is total cost.

Q. As a matter of fact, Mr. Hendershott, in most cost plus bids isn't it true it is direct cost plus 10 per cent? A. No, sir.

Q. It is not?

A. No. If it is, they ballooned their direct costs.

Q. I beg your pardon?

A. I say, if it is, they have ballooned their direct costs.

Q. Now, then, I notice on the fourth line from the bottom you have "Accumulated Balance Due without Retainage?" A. Yes.

Q. Now, what do you mean, balance due? Is that shown on the records of the Concrete Construction Company?

A. No, not as that figure, no.

Q. All that that means, actually, is the excess of the so-called costs over the amount received in that particular month? A. That's right

Mr. Holman: Your Honor, again I move that word "due" be stricken for the same reason previously assigned, in view of the witness's answer.

The Court: Well, let's see; if we strike out the word "due" on there, it might serve the purpose; "Accumulated Balance without Retainage." That's on the third item from the bottom. All right, you may proceed.

(Testimony of L. R. Hendershott.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Then that line shows merely the difference between the amount expended as shown by the books that you examined, and the amount received?

A. That's right.

Q. And it also includes the 20 per cent overhead and the [1396] 10 per cent profit?

A. It does.

Q. Now, then, this interest of 6 per cent on the balance, as I understand it you have figured interest on the sum of \$1960.07 from March, 1944, until November 1, 1945, is that right? Referring to the first column of March? A. Yes.

Q. You'll notice that figure there, \$1960.07?

A. That's right.

Q. Now, then, in figuring your interest, you took 6 per cent on that figure from March 1, 1944, until November, 1945?

A. If you will follow the interest line, taking the March, \$1960.07, under the April column there is interest there of \$9.80, which is one half of 1 per cent of that \$1960.07?

Q. Yes.

A. In computing the interest you have to go back to the previous month's accumulated balance.

Q. Now, then, the figure of \$22.13 is interest on \$1960.07 for one month, and \$4426.53——

(Testimony of L. R. Hendershott.)

A. That \$4426.53 is an accumulated balance, which is the \$1960.07 plus.

Q. Oh, I see, that is an accumulated balance?

A. That is an accumulated balance, and there is one half of 1 per cent taken the following month on on the accumulated [1397] balance.

Q. Now, then, on the books of the Concrete Construction Company which were furnished you by Mr. Boone, was there entered any item for overhead expense, sir?

A. The actual overhead as incurred.

Q. I beg your pardon?

A. The actual overhead as incurred.

Q. For all jobs, however?

A. For everything.

Q. But not as to this job?

A. Not as to this particular job.

Q. And with reference to the item of profit, that's not shown on the books that were furnished you either, is it? A. No.

Q. And with reference to the item of accumulated balance without retainage, that was not shown either, was it? A. No.

Q. And with reference to the item of interest, 6 per cent on said balance, that was not shown on those books either, and with reference to the final total, that doesn't show on their books either, does it? A. No, it doesn't.

Q. In other words, their books do not show any amount due them of \$61,364.44? [1398]

A. No.

(Testimony of L. R. Hendershott.)

Q. That's merely a computation that you have made? A. That's right.

Q. And you prepared this statement under Mr. Schaefer's direction, did you not?

A. Pardon?

Q. You prepared this statement at Mr. Schaefer's direction? A. At his request.

Q. At his request?

A. Not at his direction.

Q. Well, he requested you to do it; he didn't tell you how to do it? A. That's right.

Q. Did he state why he wanted this prepared?

A. I don't recall the exact—at that time, his reason; I was pretty well aware of——

Q. Of the situation?

A. ——of what the ultimate use of it would be, yes.

Q. And you anticipated that this would be used in court, or at least in making a claim against Macri and Company? A. Yes, that's right.

Mr. Hawkins: That's all, your Honor.

The Court: We'll recess for 10 minutes.

(Short recess.) [1399]

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

Mr. Hawkins: Oh, by the way, Mr. Hendershott, did you have an opportunity to get that statement of Mr. McKelvey's?

A. No, I didn't get that out of the file.

(Testimony of L. R. Hendershott.)

Cross-Examination

By Mr. Holman:

Q. Mr. Hendershott, you gave some items which you said were paid for Schaefer and Company; I think it was \$3018.41? A. Yes, that's right.

(Whereupon, Letter Shell Oil Co. to Macri dated June 21, 1945, was marked Defendant Macri's Exhibit No. 65 for identification.)

(Whereupon, Letter Central Service Station to Macri, dated July 9, 1945, was marked Defendant Macri's Exhibit No. 66 for identification.)

Q. Handing you identification 65, from the Shell Oil Company to Macri and Company, setting forth a total of \$493.57, is that one of those items?

A. That's the amount of one of the bills.

Q. Yes, sir; now, then, is that item for the oil as billed in your item of gas and oil?

A. If I recall, there was part of the form oil and gasoline and oil that were purchased from Shell Oil. I don't know [1400] that that statement, without analyzing it as to exactly which of those items or not, what amounts they cover.

Q. Well, directing your attention to the wording of the second paragraph of the transmittal letter, doesn't that explain what that's for?

A. No, it doesn't.

Q. What is there in your figures that identifies whether this \$493.57 is included in the gasoline and oil or is not?

(Testimony of L. R. Hendershott.)

A. The total of the bill is included in the total costs. As to the particular designation, I would have to go back to the individual invoices and analyze it.

Q. Yes, sir; then what is there to indicate that it is also in the \$3018.41 item.

A. It is in there.

Q. In other words, it is in there in two places, is it not?

A. In one place as a charge, and another place a receipt of payment from Macri and Company.

Q. Yes, that is, a credit of payment by Macri of \$493.57 of gasoline and oil?

A. That's right.

Q. Then the total gasoline and oil figured up there should be short in that amount?

A. No, sir, not unless you take that amount out of the payments of \$32,000 we have credited him with. [1401]

Q. Then, with reference to this communication from the Central Service Company, identification 66, an itemized bill from January through April, 1945, where is that? Is that part of the three thousand odd dollars that I called to you as payment?

A. That is credited to Macri as a payment.

Q. Where is it charged?

A. Well, I see running through here, there is some gasoline, some oil, some repairs.

Q. Would you answer my question? Where is it charged on your books?

(Testimony of L. R. Hendershott.)

A. Well, I say, there is gas, and oil, and repairs, there is three items.

Q. Well, do I understand, for instance, that you took the Central Service Station bill and broke it up into the various items? A. That's right.

Q. And then similarly, you claim you took the Shell Oil Company bill and broke it up into the several items? A. That's right.

Q. In other words, you had these bills, but they were not paid? A. That's right.

Q. And then the order was given to Macri and Company to pay them? [1402]

A. They had been paid by Macri and Company before I made my examination.

Q. Oh, did you make your examination, then, before or after the State of Washington commenced an action for the non-payment of the industrial insurance, social security welfare, and other taxes?

A. According to my records, there was an amount of \$527.30 paid to the Department of Labor in Washington.

Q. By whom? A. By Macri.

Q. That was after suit, was it not, after a suit and a writ of garnishment?

A. I don't know about that.

Mr. Olson: I submit that isn't proper cross-examination. He can ask when it was paid, if he wants to.

Q. Well, when was it paid?

A. Sometime, according to the record, prior to May 30, 1945. I don't know the exact date.

(Testimony of L. R. Hendershott.)

Q. And then there was an additional amount paid by Macri and Company, was there not?

A. To——

Q. The State of Washington.

A. The Washington Unemployment Compensation Commission.

Q. How much was that? [1403]

A. \$359.22. I don't know the division offhand; there was \$9.05 interest.

Q. And those both had been paid before you made your audit? A. They had.

Mr. Holman: Counsel, I wish to call for the production of Mr. Schaefer's copy of the notice of levy by the United States of America.

The Court: I didn't get what that was.

Mr. Holman: Notice of levy, your Honor. We've affirmatively pleaded it in our answer, United States of America and the State of Washington.

Mr. Olson: You mean you're asking for that now?

Mr. Holman: Yes, sir.

Mr. Olson: I don't think that is proper cross-examination of this witness. I don't know what it's got to do with Mr. Hendershott's examination.

(Whereupon, notice of levy by United States against Schaefer was marked Defendant Macri's Exhibit No. 67 for identification.)

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's Identification 67, "Notice of Levy" specifying the amount of \$10,224.95, and the items thereof, will you inspect that, please, and tell me whether or not you included that or any parts of that in your compilation? [1404] A. Of this?

Q. Pardon me; first, do you include that or any part of it in your compilation?

A. That needs explanation, your Honor, before I can answer that. I can't say yes or no.

Q. Well, can you tell me whether you included any part of it in your compilation, then you can make all the explanation you want, sir.

A. There would be part of it included.

Q. Yes, sir; now, will you explain?

A. This notice of levy is for unpaid taxes, income tax, with-holding, social security, federal excise, and income tax, covering the period that this job was in progress and subsequent, and represents the total liability of the Concrete Construction Company as of this date for those items on all operations, not particularly on this one.

Q. Now, then, can you tell me, please, how much of the total amount distrained for is represented on the Roza job? A. No, I cannot.

Q. Why can't you?

Mr. Olson: Objected to as wholly immaterial,

(Testimony of L. R. Hendershott.)

how much of this distraint is represented on the Roza job. I don't see what it has to do with this case at all.

The Court: Is that a distraint filed against [1405] Macri?

Mr. Holman: Yes; "You are hereby notified that there is now due and owing from Schaefer and Company," so many dollars. Now, my question is, what portion of that, if he can say from his compilation, is due from the Roza job, and he says he can't answer; that's correct, is it?

A. That's right.

Q. Did you have made available to you in advance of making your compilation the breakdown of the labor on the Roza job as disclosed by the—I believe you said Mr. Schaefer's copy of the certified payroll? A. Yes.

Q. By the certified copy of the payroll you mean the payroll which Mr. Schaefer furnished the United States Bureau of Reclamation in connection with the Roza job? A. That's right.

Q. Did you any breakdown of that payroll with respect to the allotments of charges to the respective operations? A. No, sir.

Q. Then you had nothing before you to indicate the number of hours, for instance, spent in pouring concrete?

A. That is on the daily manifests which were available to me, but I did not make use of that information.

(Testimony of L. R. Hendershott.)

Q. I see; you had that information available but did not [1406] make use of it?

A. That's right.

Q. And did you have information available as to the number of man hours expended on excavation or fine grading?

A. There were notations on the manifests, but I did not make any use of that.

Q. What do you mean by manifests?

A. The daily report from the superintendent on the job.

Q. Oh, yes. Then when did you start making your audit,—pardon me, we don't use the term "audit" here; what do you call it, your compilation?

A. Examination; November 26.

Q. That's the date of your letter. How long before that had you started working on it?

A. Oh, it was probably over a period of—just guessing, now, 30 days.

(Whereupon, Letter Schaefer to Macri, August 14, 1945, was marked Defendant Macri's Exhibit No. 68 for identification.)

(Whereupon, Letter Schaefer to Macri re extras, to Jan. 31, 1945, was marked Defendant Macri's Exhibit No. 69 for identification.)

Q. Handing you what has been marked Macri's identification 68, I'll ask you if a copy of that was made available to you for the purpose of reflecting itself in your compilation? [1407]

A. I have seen this statement; whether it was before or after my examination I don't know.

(Testimony of L. R. Hendershott.)

Q. Well, then, I'll show you Macri's 69, calling your attention to the date of the transmittal letter, August 14; did you see that compilation attached to that, sir?

A. Now that you show me two, they differ in some respects; I've seen one or the other, and I don't know which.

Q. Now, isn't it a fact that you made the computations to arrive at these figures, or not?

A. No, I did not.

Q. Well, is it a fact that these computations as reflected by identifications 68 and 69 were available and before you at the time you made your compilation?

A. No, they were not.

Q. And were you told of them, or not?

A. As I say, I saw one or the other, possibly I've seen both of them, but they were not given any consideration.

Q. Well, that isn't what I asked you, sir, whether they were given consideration or not. Did you have them supplied you as part of the information?

A. No.

Q. Now, did you or did you not make your compilation at the direction of Mr. McKelvey, a lawyer for whom you have charged services there? [1408]

A. No, sir. I have never met Mr. McKelvey, or talked to him.

Q. Never met him; yes, sir. Are you able from your own books and records to indicate the number of man hours that was applied, for instance, on roofing the building?

A. No, sir.

(Testimony of L. R. Hendershott.)

Q. Are you able to indicate from your own books the time loss claimed by reason of second-hand lumber? A. No, sir.

Q. Are you able to indicate any item with respect to allocation of man hours with respect to any item of job performance? A. No, sir.

Q. You have no such records here?

A. No, other than, as I mentioned, the manifests, which have not been recapitulated.

Q. Oh, yes; then the first computation made by, through, or under your direction or to your knowledge is the compilation which is in evidence as plaintiff's Exhibit 63?

A. That is the only one which I prepared for the Concrete Construction Company as pertains to the Roza Project.

Q. And I believe you told me that your letter of transmittal was November, 1945?

A. 1945, I believe, yes.

Q. November 26, 1945; and that your work of compilation was [1409] about one month before that?

A. Within the thirty days before that.

Q. Within thirty days before that; you mention in your transmittal letter, do you not, attached to the original of this compilation, that you had before you the contracts. You say "contract with Macri Company." Now, are you referring to the government contract with the Macri Company, or are you referring to the contract between Macri Company and Concrete Construction Company?

(Testimony of L. R. Hendershott.)

A. No, I saw the sub-contract between the Concrete Construction Company and Macri Company.

Q. That's the one, and the only one, you're referred to? A. That's right.

Q. You show in your compilation, do you not, an accumulation of retainage, an amount retained each month? A. Yes, that's right.

Q. Then you charge interest on that, do you not?

A. No, sir.

Q. You do not charge interest on that?

A. Well, I—yes, there would be.

Q. Yes, sir; now, if it is disclosed by the sub-contract that the terms of payment under the sub-contract shall abide the terms of payment under the principal contract, then would the charge of that interest be proper for any time except while Macri held the money after the government [1410] had paid it to Macri?

Mr. Olson: That question is objected to, your Honor, as not being a proper question.

The Court: Read the question over.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I think it is asking this witness for a legal conclusion.

Mr. Holman: No, I'm asking as an accounting proposition.

The Court: Well, I'll overrule the objection, if he can answer it as an accountant.

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. I didn't ask you to determine it; I asked you if it would be proper.

A. Not until after the final payment had become due, that's true.

Q. Yes, sir. Now, then, that's what I wanted to get at, sir. In the second column, for April, 1944, you have interest of \$9.80?

A. That's right, sir.

Q. And that interest, as I understand your computation, is at 6 per cent upon \$1960.07 for one month, right?

A. That's right.

Q. Now, is that for the month of March, 1944?

A. That's for the month of April.

Q. Of April, 1944?

A. That's right.

Q. Well, would there be a percentage of that \$9.80 that should not be charged until after Macri had the money from the government and did not pay you on the preliminary or monthly estimate?

Mr. Olson: If your Honor please, I'm going to again object to that line of questioning. It is asking this witness to pass upon an issue of law, because our position is that this sub-contract was abrogated first when Mr. Macri agreed with Mr. Schaefer that they would pay our entire costs under this job. If that be the case any retention under the sub-contract became wholly immaterial and of no force and effect, and when Mr. Macri breached his con-

(Testimony of L. R. Hendershott.)

tract and failed to do the things he agreed to do, namely to excavate and on time, and to furnish lumber and on time, that they again abrogated the contract, and from that moment Mr. Macri became indebted to use for labor and material and service.

Mr. Holman: I have this in mind only: I would like to argue the legal points with counsel at the proper time, but just at present this gentleman in his transmittal letter which is attached to the original answer and cross-complaint—I mean the amended complaint of the [1412] plaintiff Schaefer——

Mr. Olson: Attached to the original complaint, isn't it?

Mr. Holman: Yes, and referred to in the amended, in the first sentence says: "Pursuant to your request I have examined the original records pertaining to the Roza Project contract with Macri," showing he has the contract under consideration, "under Bureau of Reclamation job 1062, and present herewith a statement of costs prepared from the above original records," so the witness has shown by his transmittal letter that he used that contract, and therefore I submit it is a proper question.

Mr. Olson: If he wants to ask what the witness did, that I think is proper, but if he asks whether it should have been done, then he's asking the witness as to what our legal rights are. I think counsel's got a right to interrogate the witness as to what he figured, and so forth.

(Testimony of L. R. Hendershott.)

The Court: Well, I'll overrule the objection.

Witness: Your Honor, may I make a remark here? In regard to that paragraph Mr. Holman just read, that phrase "contract with Macri and Company" does not in particular refer to the sub-contract as pertains to this job, but is merely identifying the portion of the Roza Project on which these costs were incurred. [1413]

Q. But didn't you just a minute ago, Mr. Hendershott, answer me that you had the sub-contract?

A. I have read the sub-contract, yes, sir, but what I'm getting at, Mr. Holman, I did not have that in mind in referring to this phrase as interpreting that sub-contract.

Q. Let me ask you, Mr. Hendershott, did you have before you the monthly estimates of Concrete Construction Company and work performed by them as furnished to them by Macri and Company?

A. I had the——

Q. What they call the progress estimates?

A. I had the voucher portion of Macri Company checks, was where I got the information which indicated the payments and the yardage poured.

Q. Yes, sir; and now, did you not also have the yardage estimates before you, themselves?

A. I don't recall them.

Q. Did Mr. Schaefer furnish you those?

A. I don't recall having seen them, no.

Q. Well, then, as this interest accelerates down through, at your arbitrary rate of 6 per cent, there

(Testimony of L. R. Hendershott.)

is a charge each month for the accumulation of the retained percentages between the time they are retained and ultimately paid by the government, is that correct?

A. Yes, that would be correct. [1414]

Q. Mr. Hendershott, you understood, did you not, from your general accounting experience, you understood that on all public works there is a retained percentage held until final completion and acceptance of the work?

A. Yes, I've seen that on other jobs.

Q. And you understood, did you not, that that retained percentage was added to month by month by month of the additional percentages of the amount determined for that month, the amount certified per month?

A. Yes, that's right.

Q. And notwithstanding that, you charged this interest throughout?

A. That's right.

Q. Now, you say that the item of \$201.25 shown in the month of February, 1945, is an engineering expense of Mr. C. E. Hewitt?

A. That's right.

Q. And that was not expended for the purpose of any propulsion of the job, but for the purpose of preparation for trial data, was it not?

A. That's right.

Q. Well, then, will you tell me, please, whether or not the entry of that item, \$201.25, is a fair and a proper item to reflect to this court the cost of doing that job?

Mr. Olson: If the Court please, I object to that

(Testimony of L. R. Hendershott.)

[1415] question. He's asking for a conclusion of this witness. This witness has made an audit of the books, showing the costs that went into this job. Now, when that item came up I submitted to your Honor exactly what it was.

The Court: I think the question is objectionable, as argumentative. The witness has shown what is included here. Whether it is proper to be in there for the court to determine.

Mr. Holman: I didn't mean to make it argumentative, your Honor, and I concede it is argumentative, and I withdraw the question. I don't want to argue.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Also the item of \$533.57, shown between May and November, which you indicate as legal expense, was not an item expended in propulsion of the work itself, was it? From the books and records; I'm not asking you from memory, Mr. Hendershott; from the books and records.

Mr. Olson: Now, your Honor, I think that's asking for a conclusion of this witness. He can state what the legal expense item is; matter of fact, I'm inclined to think we did hurry this job along, but to ask this witness whether or not this money expended to McKelvey hurried Maeri along on this job is certainly asking this witness to state a conclusion.

(Testimony of L. R. Hendershott.)

Mr. Holman: I don't want the witness's conclusions; [1416] I want whether or not that \$533.57 was a charge while the job was in progress.

The Court: I assume what counsel wishes to bring out is what this witness can say as to the various items as shown on the books. He isn't supposed to know of his own knowledge. Now, if he can answer from the books and records, I think he should. I'll overrule the objection.

Witness: Mr. Hawkins asked me to get that bill and I haven't done it, and until I do I don't know what period it covers.

Q. What I want to know is whether that's off the bill or off the books of the company that that entry is made.

A. It's off an original bill from McKelvey's office.

Q. And you will get that so we can see that, sir?

A. Yes, I will.

Q. Now, for the total items of payments received, in your final column, \$32,614.66?

A. Yes.

Q. I think you answered that that was off of the Concrete Construction Company's cash entries on their books?

A. That's right.

Q. Yes. Did you endeavor to verify that by reference to the checks showing the quantities determined as submitted by Macri and Company?

A. I said a few minutes ago that I had also the voucher [1417] portion of Macri's checks.

Q. Then is it, or is it not, your answer that the

(Testimony of L. R. Hendershott.)

voucher portion of Macri's checks also show \$32,614.66 paid direct to Concrete Construction Company? A. No.

Q. How much?

A. That includes the \$3018.41.

Q. Oh, I beg your pardon; so it would be——

A. \$29,596.25, I believe.

Q. Where is that figure? A. Pardon?

Q. Where is that figure?

A. That's the difference between \$32,614.66 and \$3018.41.

Q. Would you give me that figure again, please?

A. That would be \$29,596.25, I believe.

Q. Now, in the figure of \$3018.41 which you say are items paid by Macri and Company for the Concrete Construction Company, you means by that, paid on order of the Concrete Construction Company, do you not? A. That's right.

Q. Is it not a fact that there are included at least two court cost items and some attorneys' fees?

A. Not to my knowledge there are not.

Q. I see, you didn't know that, sir?

A. And I don't believe that is true. [1418]

Q. Oh, why do you say that, sir?

Mr. Olson: Your Honor, it is wholly immaterial. We acknowledge receipt of that money, as a credit. Whether or not it was to buy peanuts, if we give him credit on his account, whether it included costs, attorneys' fees or what it included is immaterial. It is not a part of the charge; it is part of the money we give them credit for.

(Testimony of L. R. Hendershott.)

Mr. Holman: This witness has just answered the very thing I was interested in, whether or not he had included in his compilation the items of court costs. If he has, that's one thing.

The Court: You mean as part of the costs of the project?

Mr. Holman: No, as a credit.

The Court: What difference does it make, if it is a credit?

Mr. Holman: If \$3018.41 does not have the court costs in, then that figure naturally would not be a total figure.

Mr. Olson: We stipulated at the pre-trial, didn't we, that \$32,614.66——

The Court: Is the amount paid; is there any question about that?

Mr. Holman: No, there isn't, but I'm trying to [1419] find out from this witness if the \$3018.41 is the total amount deducted to bring this matter to \$29,596.25, or if there were additional amounts deducted. I'll not pursue it any further, in view of the pre-trial, your Honor, but I was not clear on that point.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Will you answer me, please, whether the profit which you have shown at 10 per cent here is representative of the earned profit of the Concrete Construction Company for all of its opera-

(Testimony of L. R. Hendershott.)

tions during the period shown by those compilations?

A. No, I can't answer that offhand; I don't know.

Q. In other words, isn't it a fact that the profit of 10 per cent which you have put in here is an arbitrary 10 per cent adopted by you as your idea of what would be a fair profit?

A. That's right.

Q. And it has nothing to do with any of the books or records of the Concrete Construction Company?

A. Other than the fact that on other cost plus jobs 10 per cent was the customary amount to add, and in other firms where I have access to the books that is also customary.

Q. Yes, on a cost plus job there is a fixed percentage above actual cost? A. That's right.

Q. But as Mr. Hawkins said, it would be the actual costs expended on the job itself, would it not?

A. Included the overhead.

Q. Now, isn't it a fact in all of your experience, and particularly with the government, that the 10 per cent shall pay for the overhead and pay for the bond and pay for those items?

A. No; very definitely no.

Q. In other words, those items are allowed to be charged in? A. They are.

Q. In your fourth item, truck hire, you spoke of that being the rental of a truck? A. Yes.

Q. Where did you get that item?

(Testimony of L. R. Hendershott.)

A. From bills submitted by the truck owner.

Q. And who was the truck owner?

A. I believe the name was Ellis Robinson, or Robertson, I'm not sure which.

Q. In other words, it was not truck hire for a truck of the Concrete Construction Company?

A. No, sir.

Q. Oh, I see. Now, your item of Hunt Process and Sealcure, was that upon a statement furnished you, as a charge?

A. Several individual bills.

Q. Sir? [1421]

A. Several individual bills.

Q. And the same for the metal pipe plugs?

A. Yes.

Q. Now, are those metal pipe plugs part of the she-bolt which is in evidence here?

A. No—I don't feel that I'm qualified to explain the exact purpose of it. I can tell you approximately what they look like.

Q. Never mind; if you're not qualified, sir, we'll pass it. The item of lumber for a cement shed, where did you get that item?

A. Well, that happened to be a little bill that came in that was so marked.

Q. From whom?

A. That I can't tell you without looking.

Q. Well, answer me, was it a bill from Macri and Company for the use of lumber, or was it a bill from someone else?

A. It was from another vendor.

(Testimony of L. R. Hendershott.)

Q. And can you tell me from what source that came; where that lumber came from?

A. I can by looking it up.

Q. Would you do that, please? Oh, pardon me; forget it. A. \$2.60.

Q. We're on the wrong line. It's \$2.60. I thought it was \$23.50, the roofing. [1422]

A. That's the roofing.

Q. I'm not interested in that item, thank you. Now, in classifying the job cost, the labor, did you have before you any distribution of the various jobs occupied by the laborers, such as the superintendent, and the carpenter-foreman, and so forth and so on?

A. It was indicated on the payroll sheets.

Q. You took the payroll sheets only?

A. Yes.

Q. You didn't take the daily record, what do you call this book, the progress record?

A. The daily manifests.

Q. Sir?

A. I didn't compare them, no.

Q. May I ask you, this .024 per hour payroll insurance is what you took as the State of Washington charges, and not an adopted figure by you?

A. No, that's the State of Washington.

Q. That's just what it actually is?

A. That's right.

Q. Now, will you tell me, please, how you determined the item of \$2780.62, batching? How did you get that item?

A. That was from bills rendered.

(Testimony of L. R. Hendershott.)

Q. In other words, somebody else did the batching?
A. That's right. [1423]

Q. And Mr. Schaefer's operation, then, didn't do the batching?
A. No.

Q. And I think in connection with this word "batching" you used some other term; what did you say, batching for what?

A. Batching of aggregate.

Q. Batching of aggregate; will you please get that bill or those bills; and will you also tell me, Mr. Hendershott, whether or not the items of truck hire here are items of hire of trucks other than the Concrete Construction Company equipment?

A. I answered that a while ago, that they are separate.

Q. Oh, you may have answered it. Then are the equipment repairs and maintenance items which are shown charged, items which the Concrete Construction Company paid out, or are they allotments of labor time?

A. They're actual paid-out items.

Q. Those also would be on vouchers?

A. Yes.

Q. Or statements. Thank you.

Mr. Holman: I think that's all, your Honor.

Cross-Examination

By Mr. Ivy:

Q. Mr. Hendershott, in your examination of the original records, did you find any segregation made on the Concrete Construction Company's books that

(Testimony of L. R. Hendershott.)

would indicate extra [1424] items charged over and above the contract?

A. No, sir, there is no segregation on the books.

Mr. Ivy: That's all.

The Court: Do you have any redirect examination? I assume it will be necessary to have this witness available in the morning, unless he can look up these items now.

Mr. Olson: We'll have him available.

The Court: You'll have him available in the morning?

Mr. Olson: Are we going to go to 4 o'clock, or 4:30?

The Court: We'll go to 4 o'clock today. I might say, if there is anything else you want this witness to bring in, you might tell him now, so he can look them up.

Witness: Your Honor, I'll be in the court until the trial is over.

The Court: All right.

(Whereupon, the Court took a recess in this cause until Tuesday, March 11, 1947, at 10 o'clock a.m.) [1425]

Mr. Olson: Then we've got twelve minutes. I'll call Mr. Macri, as an adverse witness, under the rule.

SAM MACRI

called as an adverse witness, on behalf of the plaintiff, being first duly sworn, testified as follows:

The Court: I would like to request counsel to conduct this examination slowly, and Mr. Macri to answer slowly and as plainly as he can, because it is obviously going to be difficult, on account of Mr. Macri's accent, to understand him, and we'll have to work that out as best we can. You may proceed.

Direct Examination

By Mr. Olson:

Q. Your name is Sam Macri?

A. Yes, sir.

Q. You're one of the defendants in this case?

A. Yes.

Q. Now, Mr. Don Macri is your son?

A. He is.

Q. And Mr. Joe Macri is your brother?

A. He is.

Mr. Holman: Your Honor, isn't this all settled in the pre-trial? I thought so.

Mr. Olson: I was under the impression that you went to some length, Mr. Holman, to deny my allegation that Macri and Company, insofar as this case was concerned, consisted of the three Macris and A. J. Philp and Mr. Goerig. [1426]

Mr. Holman: All right, to save time.

Mr. Olson: I don't like to spend any time on it if it is conceded.

(Testimony of Sam Macri.)

Mr. Holman: There's been no pre-trial so far as Macri and Company partnership is concerned.

Mr. Olson: That, and the relationship of Mr. Goerig and Mr. Philp.

Mr. Holman: That's different. That was not conceded.

The Court: The relationship of Mr. Goerig and Mr. Philp to the Macris?

Mr. Olson: Yes.

The Court: Well, that's controversial; I don't think we could reach any agreement on that, probably.

Mr. Hawkins: I understood the joint venture agreements were stipulated to.

The Court: Aren't they in evidence here?

Mr. Olson: I'll say this, your Honor; what I wish to show by Mr. Macri is that Sam Macri, Don Macri, and Joe Macri are co-partners, doing business as Macri and Company, and that the relationship insofar as this case is concerned of that Macri Company with A. J. Goerig and Clyde Philp is as shown by the joint venture agreement that is in evidence. If that's conceded by counsel——

The Court: And the agreement terminating the joint [1427] venture?

Mr. Olson: No.

The Court: Is there no question about that?

Mr. Holman: Nothing changed, sir; there just can't be.

The Court: If there is no question about it, then that is agreed.

(Testimony of Sam Macri.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Then, Mr. Macri, showing you plaintiff's Exhibit 5, being a sub-contract bearing the signature of Macri and Company, by Sam Macri, and Concrete Construction Company, by M. C. Schaefer, you had that contract prepared, did you not, Mr. Macri?

Mr. Holman: Just a minute. Your Honor, that's also covered in the same way.

Mr. Olson: Oh, no.

The Court: What is the identification?

Mr. Olson: Exhibit 5.

The Court: That's the sub-contract?

Mr. Olson: On 1062.

The Court: Well, I'll permit him to answer.

Mr. Olson: If counsel concedes it, I won't waste any time on it, if he concedes that Mr. Macri had this prepared.

Witness: Yes, I had this prepared. [1428]

Q. You had that prepared?

A. When Mr. Schaefer's present; Mr. Schaefer was over there when we prepared this.

Q. I'm not asking if Mr. Schaefer was present when it was——

A. When we prepared it on this stuff he was present. Mr. Schaefer was present when this was prepared.

(Testimony of Sam Macri.)

Q. Now who, Mr. Macri, typed in the typewritten portion of that Exhibit 5?

A. Well, that was typed in the office.

Q. In whose office.

A. My office.

Q. In your office? A. Yes.

Q. And by whose stenographer?

A. Well, there was two or three people in the office there.

The Court: Try to speak up a little.

(Whereupon, the reporter read the last previous answer.)

The Court: The question was "who typed it?"

A. One of the people in the office typed it.

Q. In your office? A. Yes.

Q. Now, where did you get that printed form, Mr. Macri?

A. Well, this sub-contractor form, we've been using for all sub-contracts. [1429]

Q. Not so fast.

A. That's a regular sub-contract form that we had, already printed.

Mr. Olson: I ask that that be stricken as not responsive. My question is "Where did you get that form?"

Mr. Holman: I submit he has answered it.

(Whereupon, the reporter read the last previous answer.)

The Court: I think that answers it, doesn't it?

(Testimony of Sam Macri.)

Mr. Olson: Well, he says it is the regular form that he was using.

Q. In other words, Mr. Macri, that's your form of contract, is it not?

A. This was prepared, who it was prepared it I don't know. I think that was prepared for somebody and we had them in the office ourselves, we bought some of this sub-contractor form.

Q. You're the one that selected that form of contract for use in this agreement signed between yourself and Mr. Schaefer?

A. We used it for all sub-contracts.

Q. And you also, Mr. Macri, you on behalf of Macri and Company selected it for this particular job?

A. For every job.

Q. Including this one? [1430]

A. Including this one. Mr. Schaefer went over this before it was signed, this sub-contract.

Mr. Olson: I ask that be stricken as not responsive.

The Court: It will be stricken.

Q. Now, showing you plaintiff's Exhibit 6, Mr. Macri, which is the sub-contract on 1068, you also selected that contract, did you not?

A. Same form we had, yes.

Q. And you selected it?

A. Well, I don't know if I selected it. That's the same form we had in the office.

Q. Mr. Schaefer didn't bring that contract to your office, did he?

A. No, we had them.

Q. Pardon?

A. We had them ourselves.

(Testimony of Sam Macri.)

Q. And that contract also was prepared in your office? A. Yes.

Q. And by whom? A. By both of us.

Q. Isn't it a fact, Mr. Macri, that you personally had each of those contracts prepared before Mr. Schaefer saw them?

A. Not until he had accepted the proposition, no.

Q. And then you prepared—in other words, after you and Mr. [1431] Schaefer had agreed as to your price, you then prepared each of those contracts 5 and 6 for Mr. Schaefer's signature?

A. This contract was already prepared; we agree, Mr. Schaefer and I, we agree what we're going to put in it, then when came back tomorrow, if it is satisfactory, we both sign.

Q. But you put it in?

A. With his permission, naturally, he agree with me.

Mr. Olson: I ask it be stricken as not responsive.

The Court: Try to answer the questions directly. I think I know what's he's testified to.

Q. Mr. Macri, after you agreed with Mr. Schaefer as to the price that he was going to do this work for, you then prepared each of those contracts, being Exhibits 5 and 6?

A. Was prepared in the office.

Q. By you?

Mr. Holman: I submit it's been answered two or three times, your Honor, by somebody in his office.

The Court: Well, there is some question about

(Testimony of Sam Macri.)

it. He doesn't answer very directly. If he wouldn't try to make so many explanations, and answer the questions——

Witness: That was prepared in my office.

The Court: In your office.

Mr. Olson: He said by him, didn't he? [1432]

The Court: Well, I don't think that he typed it out. It was prepared in his office by someone under his direction.

Mr. Olson: I don't want Mr. Holman saying Mr. Schaefer prepared it.

(Whereupon, the reporter read the last previous answer.)

Q. Was it prepared by you, or by someone under your direction in your office?

A. There was a fellow by the name of Hjorth handled all this sub-contract; he was our estimator.

Q. And who is Mr. Hjorth, your estimator?

A. He used to be.

Q. He was then? A. Yes.

Q. He was your employee? A. Yes.

Q. And he had that contract typed up in your office?

A. After we agree, yes, and tell him what to put in it.

Q. After they agreed, then your employee had that contract typed up?

A. Yes, this was typed in our office, there isn't any question about that.

Mr. Olson: Your Honor, he invariably comes back, says "It was typed in our office." I think

(Testimony of Sam Macri.)

he can answer [1433] that question. It's a simple question. He just obviously doesn't want to do it.

Mr. Holman: I think that's not correct. I think the witness is trying to answer exactly what was done.

The Court: Well, try again. Who typed it up, if he knows.

Witness: Can I explain, your Honor, the way it was done?

Q. Just answer my question, Mr. Macri. Was that contract dictated on the form which you testified you had in your office, was the typewritten matter, was that dictated by one of your employees, by someone working for you?

A. Yes, it was typed by our bookkeeper, but this Mr. Hjorth would tell him what to put in, and he put the words in.

Mr. Olson: Thank you. That's all.

The Court: Is there any cross-examination?

Mr. Holman: I think not now, your Honor.

The Court: Well, we'll adjourn, then, until tomorrow morning at 10 o'clock.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Tuesday, March 11, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, March 11, 1947,
10 o'Clock A.M.

(All parties present as before, and the trial
was resumed.) [1434]

L. R. HENDERSHOTT

a witness called on behalf of the plaintiff, resumed
the stand and testified further as follows:

Mr. Holman: Further direct?

Mr. Olson: Partly, and partly that that I asked
him to look up yesterday.

Redirect Examination

By Mr. Olson:

Q. Mr. Hendershott, yesterday you were referring to the item that is designated miscellaneous on plaintiff's Exhibit 63. Have you had an opportunity to determine the breakdown of the various items included in that account of miscellaneous?

A. I have analyzed the account and have the detail on all except three items during the course of the job.

Q. Now would you give me the items that you've got there? A. Starting in March——

Q. Just give us the totals, if you can.

A. I don't have them in totals. I have them in detail only.

Q. Well, you've got quite a few figures, then?

A. Yes, I have.

Q. How much time would it take, Mr. Hender-

(Testimony of L. R. Hendershott.)

shott, to add up [1435] so that you can give us just the totals, or are they susceptible?

A. Yes, I can total them, and give you probably a total of 10 or 12 figures covering all the various classifications except for the three items which I have not found. The invoices on these identified them definitely.

Q. I wish you would do that. I think, your Honor, that that will suffice, at least for my purposes. I don't need to know how much each item, each month.

The Court: What is this the detail on?

Mr. Olson: The item of miscellaneous that is in our Exhibit 63.

A. \$144.21, the fourth item from the bottom.

Mr. Olson: In other words, from the item itself you can't tell what it is, and I was going to have him detail as to how much was in each particular item.

Redirect Examination
(Continued)

By Mr. Olson:

Q. Well, then, Mr. Hendershott, referring to your column "Overhead Expense—20 per cent of Direct Costs," I don't believe I asked you to elucidate on just what items went in to make up that overhead expense.

A. Well, there is the general office expense, such as office salaries, office supplies, advertising, dues and subscriptions, insurance, general insurance, light, heat and power in the office, rent, and there

(Testimony of L. R. Hendershott.)

is equipment [1436] items depreciation, the shop and warehouse expense, and general items such as licenses and taxes, telephone, travel, discounts, building repairs, building maintenance; that covers the principal items. There may be, there probably are miscellaneous small items not in that.

Mr. Holman: Postage, telephone, and telegraph?

Q. So that you figured in depreciation on machinery and equipment in your general overhead expense?

A. In the general overhead, yes. That is the only charge made to this job for equipment owned by the company.

Q. Well, is it true, then, that as to the Mixomobile and trucks and things of that kind, that the charge for that equipment is included in this overhead expense?

A. Yes, the depreciation on those equipments is included as part of the overhead.

Mr. Olson: Well, your Honor, that's all I have for Mr. Hendershott except I want to get that miscellaneous total in there.

Recross-Examination

By Mr. Holman:

Q. Mr. Hendershott, you gave in the overhead travel expense, and you have a travel expense item in this detail, in your compilation; is that the portion of the travel expense that's chargeable to this job, or not?

(Testimony of L. R. Hendershott.)

A. No, the travel expense that is included in overhead is general travel that is not allocable to any particular [1437] job.

Q. In other words, then, if Mr. W. E. Schaefer were travelling to San Francisco this job would be charged with part of that?

A. Through the overhead, if it were on company business.

Q. Yes, and I believe you said about 20 per cent of the total overhead, did you not?

A. Well, there is 20 per cent of the direct costs that's charged as overhead.

Q. Well, isn't that a direct cost?

A. Pardon?

Q. That's not a direct cost? That is a direct cost of business, but not of this job?

A. That's right; I mean a trip to San Francisco would not be a direct cost to this job.

Q. And the insurance, you have payroll insurance here; did you have public liability and personal injury insurance? A. Yes.

Q. Well, is that chargeable to this job, or is it chargeable under the proportion?

A. That's chargeable in general overhead.

Q. Although the policy ran specifically for this job? A. No.

Q. Well, that's what I'm asking.

A. No, to my knowledge there was not a specific liability [1438] insurance policy.

Q. Oh, you had blanket coverage?

A. Blanket coverage.

(Testimony of L. R. Hendershott.)

Q. I see, sir; and the building repairs and building maintenance would be on your Portland ownership?

A. On the Portland warehouse and office building.

Q. And did not include any improvements on this job? A. No.

Q. And what was the depreciation you extended for the Mixomobile; how much?

A. I don't have a detailed depreciation schedule with me.

Q. Will you get that, please?

A. It is approximately 10 per cent of the cost per year.

Q. And the Buggymobile? A. The same.

Q. Approximately 10 per cent of the cost per year. Now, was that rate used in the income tax.

A. It was.

Q. Did you have an opportunity to get Mr. McKelvey's bill? A. Yes, I have.

Q. May I have that, please? You have no itemized bill at all? A. No, sir.

Q. And this is not shown paid. Is it a paid bill?

Mr. Olson: I think it's immaterial, your Honor.

Mr. Holman: Well, I think it is material, your Honor. It doesn't even tie it to this job, except in the heading. It's not detailed at all, and there is \$33.00 worth of long distance tolls that do not tie up to this job at all. You have no detailed bill?

A. No, sir.

Mr. Olson: Your Honor, the bill says "To serv-

(Testimony of L. R. Hendershott.)

ices rendered, including reviewing file, conferences, briefing, two trips to Yakima, and all related services;" it is addressed to Concrete Construction Company, Macri and Company, in re sub-contracts 1062 and 1068; disbursements, telephone calls paid; expense of trip to Yakima, \$12.50; \$33.57 advanced, and total, \$533.57. I submit that the bill is as itemized as that generally submitting by professional men for professional services.

The Court: Well, counsel is just cross-examining here; this document isn't in evidence. Proceed with the cross-examination.

Recross-Examination
(Continued)

By Mr. Holman:

Q. You can't tell me, then, Mr. Hendershott, from your own records that you have before you, whether the services Mr. McKelvey rendered were services in preparation of this litigation, or were services rendered for propulsion of the job itself?

A. No, I can't tell you what they were for, other than what [1440] the bill says.

Q. Well, the bill doesn't give any dates?

A. No, that's true.

Q. And you have no dates?

A. I have no dates.

Q. This bill is shown dated October, 1945; you had this bill before you, but you made no inquiry as to that? A. That's right.

Q. You didn't ask for any segregation to de-

(Testimony of L. R. Hendershott.)

termine what was chargeable to this job and what was chargeable to litigation? A. No, sir.

Q. I asked you yesterday with respect to Macri's identification 67, notice of levy for \$10,224.97 due the United States by Concrete Construction Company. Did you do any checking since to find out what proportion of that, if any, is chargeable to 1062?

A. I didn't try to make any segregation of it, because it is my opinion that the whole amount is the result of this job.

The Court: I'm not sure what we're talking about here, Mr. Holman.

Mr. Holman: I'm talking about notice of levy, your Honor, which was served upon Macri and Company. It is Macri's identification 67. I'll bring it in as part [1441] of our case.

The Court: It is not in here as one item?

Mr. Holman: No.

Recross-Examination

(Continued)

By Mr. Holman:

Q. I wanted to know if you show in this compilation anywhere this compilation of this \$10,224.97 item? A. No, sir.

Q. And yet you say that in your opinion as a Certified Public Accountant it is all chargeable to this job?

A. I said it is as a result of this job.

(Testimony of L. R. Hendershott.)

Q. Well, then, would it be chargeable to this job, sir, in fairness?

A. I don't follow your reasoning on that at all, Mr. Holman.

Q. Well, please do not concern yourself about my reasoning. Answer my questions.

The Court: What was the last question?

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Your Honor, I'm not sure what he means, myself.

Q. Well, I'll explain, Mr. Hendershott. Up here for the month of March through the month of April, 1945, you have an item of labor. Now, is the charge which was made to the laborers that is in part incorporated in this levy by the United States included in these charges, or [1442] deducted from it; for instance, take the month of March, 1944.

A. The labor item?

Q. Just a minute, please, let me finish my question; labor, month of March, 1944, \$920.57, is that including the amount that was deducted from the labor to pay the government, or not?

A. Yes, that is the gross amount earned.

Q. Then isn't it a fact that your total labor item is shown at \$53,280.87, correct?

A. Yes, sir.

Q. Now, can you tell me, please, what portion of that \$53,280.87 was collected by Mr. Schaefer

(Testimony of L. R. Hendershott.)

from his labor and has been withheld from the government and included in this levy?

A. No, I can't tell you offhand.

Q. So that the item \$53,280.87 shown there for labor is not a true item of the amount that Schaefer paid, correct?

A. It is a true cost on the job, of expense incurred.

Q. Including therein the amount collected for payment to the United States?

A. That's right.

Q. And you can't give me that figure?

A. No.

Q. And you didn't compute that figure? [1443]

A. No, I did not.

Q. You knew of this, did you not, sir?

A. Yes. I don't see where it is material.

Q. Well, please, that's what we have a court for, to rule on that. I think that's all, Mr. Hendershott.

Mr. Hawkins: We have no questions, your Honor.

The Court: Mr. Ivy?

Mr. Ivy: No questions.

The Court: Anything further?

Mr. Olson: No, except that I do want those totals of those miscellaneous items.

(Whereupon, there being no further questions, the witness was excused.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Olson:

Q. You are Mr. M. C. Schaefer? A. Yes.

Q. And have previously testified at the commencement of this trial? A. I did.

Q. Now, Mr. Schaefer, when Mr. Larry Bufton was on the stand he was asked about his trip out there, field trip out inspecting these jobs. Did you accompany him out to 1062 and 1068?

A. I did.

Q. And state whether or not you showed him correctly the locations of 1062 and the location of 1068?

Mr. Holman: Just a minute. I object to that question, your Honor. The purpose of this testimony now is to bolster up the testimony of a prior witness who has already indicated what information he got and how he got it, and it can only be re-iteration for that purpose.

The Court: The purpose of it, as I understand, is to show that he examined the right structures on the [1444] ground, and the only way that can be shown is by Mr. Schaefer's testimony as to what he showed him, isn't that the purpose?

Mr. Olson: That's exactly the purpose of it.

The Court: Objection overruled.

Witness: Yes, we did.

(Testimony of M. C. Schaefer.)

Q. Now, you have in mind, do you, the two sub-contracts that have been introduced into evidence here, without my showing them to you?

A. Yes.

Q. Will you state whether or not you prepared or had prepared either of those sub-contracts?

A. I did not.

Q. Will you state whether or not the contracts were prepared previously to being submitted to you by Mr. Macri?

Mr. Holman: Just a minute; your Honor, this is quite a vital matter from a legal viewpoint, and I object to counsel's leading questions.

Mr. Olson: Your Honor, I asked him to state "whether or not." I can't see how that suggests one way any more than the other.

The Court: Well, a "whether or not" question can be leading. I'll overrule the objection in this case.

Witness: They were prepared by Macri's office or by Mr. Macri. I had nothing to do with the preparation of [1445] them. On 1062 I signed that contract at Mr. Macri's residence. 1068 I signed that contract at the job office, I believe it is the University Homes job; I had nothing to do with the preparation of it.

Mr. Holmes: Stadium Homes?

A. Stadium Homes, yes.

Q. Now, with reference to Mr. William Schaefer, your brother, appearing on the payroll at a salary, I believe he said, of \$100.00 a week, would

(Testimony of M. C. Schaefer.)

you state when your brother was shown on the payroll of this job 1062? I'm not asking for the time, but under what circumstances would he be shown on the payroll of 1062?

A. That was when he was steadily on that job, and beyond the reasonable time that a general superintendent would be on a job for his regular duty.

Q. Now, there's also been statements made as to the number of men on this job never having exceeded 12. Would you state what is the situation with reference to the number of men which were employed on this job?

Mr. Hawkins: Your Honor, I object to that. That's a broad question. He should state at what time or times. Obviously it would vary from day to day.

Mr. Olson: Your Honor, counsel's made the statement there never was more than 12.

The Court: Read the question. [1446]

(Whereupon, the reporter read the last previous question.)

The Court: With reference, I assume, to the maximum number over 12.

Mr. Holman: I would like to make this objection, your Honor, that counsel is calling for oral testimony from this witness, which is not the best evidence before this Court. Identification 16, the Schaefer payroll, is here, and it is under the certification of this gentleman, and so far as the government is concerned and the principal contractor is

(Testimony of M. C. Schaefer.)

concerned, it is a declaration accepted in a document by this sub-contractor that can't be changed. In other words, it is an attempt to substitute oral testimony for a written document under their own certification.

The Court: Well, I'll overrule the objection.

Q. Would you answer the question?

A. There have been as many as 30 men on the job at one time. There have been times there, 25, 28; the greatest number of men I am quite sure was 30.

Q. Are you able to indicate any average in that regard, Mr. Schaefer, or would it be a matter of speculation?

A. That would be more a matter of speculation.

Mr. Hawkins: Your Honor, I—well, I guess the witness is unable to answer that. [1447]

The Court: Yes, I'll sustain the objection to that.

Q. Now, were you able, Mr. Schaefer, to have available and on this job sufficient manpower as was required by the operations that were available to you? A. Yes.

Mr. Holman: Just a minute. Your Honor, I object to that as immaterial. The question wasn't whether he was able; whether he did. If counsel is referring to the term in the sub-contract that provides that in the event of some act beyond the control of the sub-contractor he is prevented from doing his work, then the sub-contract itself provides what he shall do, and the first thing is give notice,

(Testimony of M. C. Schaefer.)

and until he shows that he gave notice and got an extension of time, it is immaterial.

The Court: Overrule the objection.

Witness: We had enough men on that job for the rate of progress that we were able to make. If we had been required to double the crew we had men in Portland that I could have shoved up on this job to double the crew.

Mr. Holman: I move that the answer be stricken as not responsive to the question, your Honor.

The Court: Denied.

Q. Now, Mr. Schaefer, you've been here and heard Mr. Hendershott, the accountant, testify?

A. Yes. [1448]

Q. Did Mr. Hendershott make an examination of your records at your request? A. He did.

Q. And state what records you made available for him in connection with his examination of your accounts on 1062?

A. I made available to Mr. Hendershott all of the books and records of Concrete Construction Company. I told the bookkeeper to supply Mr. Hendershott with any information he wanted or with any books or records.

Q. And were those books and records which were submitted to Mr. Hendershott the original records of your office in regard thereto?

A. Yes.

Q. Were there any invoices submitted to him?

A. They were.

Q. And were the invoices submitted to him,

(Testimony of M. C. Schaefer.)

did they cover items that actually went into this job? A. They did.

Q. Now, Mr. Schaefer, handing you plaintiff's Exhibit 63, and taking the first item there of labor, which totals, according to the exhibit, \$53,280.87, I will ask you if that is the reasonable, if that is the actual cost and the reasonable value of the labor that actually went into the performance of 1062?

Mr. Holman: Just a minute. May it please the [1449] Court, I object to that question on the ground and for the reason that identification 16 is a certified payroll of the labor cost which this gentleman certified had been incurred on this job, and Mr. Hendershott, may it please the Court, has testified that that item is a transfer from that certified payroll, and therefore it becomes immaterial whether or not in the opinion of this witness it is reasonable or unreasonable. It is a fixed figure, according to Mr. Hendershott, and the reasonableness or the unreasonableness in the mind of this witness has nothing to do with it.

The Court: Well, I judge from the cross-examination there is some controversy as to whether it included items that didn't represent actual labor cost to Mr. Schaefer. I'll overrule the objection.

Witness: It is.

Q. And did that labor, and all of it, actually go into this job? A. It did.

Mr. Holman: Same objection, your Honor.

The Court: Overruled.

Q. Now, on the next item of payroll insurance,

(Testimony of M. C. Schaefer.)

figured at .024 cents per hour, in the total amount of \$831.64, I will ask you if that item was actually required to be paid to the State of Washington, Industrial Insurance [1450] Division, on your payroll?

A. It is.

Q. And your next item of payroll taxes, 4 per cent, \$2131.21, I'll ask you if that is the actual cost and the actual amount of the Social Security, the Unemployment Insurance, and the Federal Excise Tax on this job?

A. It is.

Q. And taking your next item of truck hire, in the amount of \$2919.96, I will ask you if that is the actual cost and reasonable value of money paid out by you for hiring a truck in the performance of 1062?

Mr. Holman: Just a minute. I would like to make the objection once so that my position is clear, and not re-iterate it. In this instance again, may it please the Court, Mr. Hendershott has testified that he had before him the statements of the various creditors, and these are the entries of those items, including this truck hire item. Now then, it becomes wholly immaterial as to whether they are reasonable or unreasonable in the mind of this witness, who is a party to this litigation, since he has submitted and your Honor has admitted the compilation made by the accountant, and nothing that this witness can say can add to or detract from the certification of Mr. Hendershott with respect to that exhibit, may it please the Court, therefore I submit it is immaterial and [1451] outside of the issue, and should not be received by the Court.

(Testimony of M. C. Schaefer.)

The Court: Well, I think under plaintiff's theory it is material to show the reasonable value of the labor and materials furnished on this job.

Mr. Holman: That is under the second cause of action, your Honor.

The Court: Well, I don't remember which cause of action it is.

Mr. Olson: It applies to both, your Honor, the first cause of action on the oral contract, and the other on the reasonable value because of their breach.

Mr. Holman: May it please the Court, if it is under the first cause of action, then I want to add to my objection that M. C. Schaefer as sub-contractor has furnished to the government, and it is here available as identification 16, the certified payroll of M. C. Schaefer including all items of labor, and there is also here his books and records with respect to these items that he's now testifying about, and that the items themselves would be the best evidence, and not this witness's testimony.

The Court: Overruled.

Mr. Holman: That may carry through?

The Court: Yes, the record may show that the same objection is made as to each item. [1452]

Mr. Olson: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

Witness: It is.

(Testimony of M. C. Schaefer.)

Q. Now, the next item of equipment rental, \$14.00, I will ask you if that item is the actual amount paid, the actual cost and the reasonable value of the rental of equipment used in the performance of job 1062? A. It is.

Q. Now, taking your next item of small tools of \$196.31, I'll ask you if that is the actual cost and reasonable value of the small tools used in connection with the performance of 1062? A. It is.

Q. And your next item of equipment repairs and maintenance in the amount of \$1761.78, I'll ask you if that is the actual cost and the reasonable value of the equipment repairs and maintenance in connection with the performance of 1062?

A. It is.

Q. And your next item of gasoline in the amount of \$1990.69, state whether or not that is the reasonable value and the actual cost of gasoline purchased and used in connection with the performance of 1062? A. It is. [1453]

Q. And your next item of oil in the amount of \$83.98, I will ask you if that's the actual cost and reasonable value of oil purchased and used in connection with the performance of 1062?

A. It is.

Q. Now, your next item is form oil, Mr. Schaefer. State what that consists of.

A. Well, that's oil that's applied to the forms to help in preventing the moisture leaving the concrete during the pouring, that is, soaking into the lumber and out into the air. It is to help cure the concrete,

(Testimony of M. C. Schaefer.)

and as a protection to the form, and helping to make it easier in stripping.

Q. Now, the item shown for form oil of \$99.92, state whether or not that is the actual cost and the reasonable value of form oil used in connection with the performance of 1062? A. It is.

Q. And your next item of hardware in the amount of \$405.18, state whether or not that is the actual cost and the reasonable value of hardware used in connection with the performance of 1062?

A. It is.

Q. And your next item of metal pipe plugs, there was some question about that yesterday. Would you state what they [1454] are?

A. A metal pipe plug is a plug that we designed to take the place of wood plugs that were ordinarily used, or were used by previous contractors on that work. It is a much easier method of putting in the first tile into the structure, which was not a part of our work, but when it became necessary for us, in order to get on with our job, to put in the first pipe into the structure, brother Bill, after seeing the first few wood plugs, said "Well, now, that's enough of that"——

Mr. Holman: Just a minute. I submit that the conversation shouldn't be included. I also submit that that portion of the answer which says what is not his work should be stricken as a conclusion of the witness. The contract should determine.

The Court: I think those portions should be

(Testimony of M. C. Schaefer.)

stricken, what his brother said and his conclusions as to what part of the work was.

(Whereupon, metal pipe plug was marked Plaintiff's Exhibit No. 70 for identification.)

Q. Mr. Schaefer, handing you plaintiff's identification 70, I'll ask you to state what that is.

A. That is a pipe plug. It was required——

Q. Just a minute, Mr. Schaefer. There's no question to you right now. Were there more than one of these used on the [1455] job? A. Yes.

Q. And is this one of the pipe plugs?

A. That's right.

Q. That was used, and which is covered by the item on this exhibit? A. It is.

Mr. Olson: We offer plaintiff's identification 70 in evidence.

Mr. Holman: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 70 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. The exhibit 63 shows metal pipe plugs of \$83.50. I will ask you to state whether or not that is the actual cost and the reasonable value of metal pipe plugs that were used in connection with the performance of 1062? A. It is.

(Testimony of M. C. Schaefer.)

Q. And the Hunt Process and Sealcure, the next item on the exhibit, would you state what that is?

A. That is a material that's spread on to the concrete to help retard the rapid leaving of moisture, or the leaving of the moisture out of the concrete prematurely. It helps to protect against the sun and as against freezing. [1456]

Q. On the exhibit, then, Hunt Process and Sealcure, in the amount of \$431.80, I will ask you if that is the actual cost and reasonable value of the Hunt Process and Sealcure which was used in connection with the performance of 1062? A. It is.

Q. How do you pronounce that next?

A. That's Sisalkraft paper.

Q. Would you explain what Sisalkraft paper is, then?

A. Well, Sisalkraft paper is also the protection against the sun or the rapid drying out of the concrete, and also as a protection against freezing. It is placed over the concrete structure.

Q. Then that item of Sisalkraft paper in the amount of \$69.60 appearing on the exhibit, I'll ask you if that amount was the actual cost and the reasonable value of the Sisalkraft paper used in connection with the performance of 1062?

A. It is.

Q. And your next item is batching? Explain what that is.

A. Well, the batching is the work that we had done by Sather & Sons. They hauled the aggregate from the aggregate piles up a ramp, dumped it into

(Testimony of M. C. Schaefer.)

the batching plant, and we batched the aggregates into our aggregate trucks, and Sather's batching was \$1.00 per yard batch of concrete; the price of Collucio at the end of——

Mr. Holman: Just a minute. I object to that, [1457] your Honor. We're going into other jobs now to bolster up his opinion as to reasonable value.

The Court: Collucio was on some other job?

Witness: No, Collucio took over this same plant, before we were through with our operations.

The Court: You're still talking about 1062?

A. That is correct.

Mr. Holman: He's talking about 1062, your Honor, but he's talking about 1062, schedule 2.

A. No, I'm talking about 1062.

Mr. Holman: Schedule 2?

A. Schedule 1.

The Court: Well, continue with your answer, then, explaining this batching item.

A. In other words, at the time we took this job it was expected that we were going to be off, or away from both jobs, by September 15. We talked to Mr. Davis of Sather & Sons about the price of batching, and he quoted us a dollar.

Mr. Holman: Just a minute. I submit that the conversations with others are not competent here.

The Court: Well, I think he can show what arrangements he made, and what price was charged, as an explanation of the item. Not the details of the conversation, though. Proceed. [1458]

A. Well, the price held firm at a dollar per batch

(Testimony of M. C. Schaefer.)

until September 15, or as long as Sather & Company were still making out of this batching plant for their own work. When they completed their work they sold the batching plant, so I understand, to Collucio.

Mr. Holman: I submit this is too historical and not enough responsive to the question.

The Court: He's asking him to explain this item of batching, what it was, and I suppose that bears on the question of whether or not it was reasonable.

A. Collucio's charge, then, for the balance of the job was \$2.50 per cubic yard of concrete batch.

Q. Now, I'll ask you, then, Mr. Schaefer, if this item of \$2780.62 for batching is the actual cost and the reasonable value of the batching services that went into this job, and used in connection with the performance of 1062? A. It is.

Q. Now, the next item is lumber for a cement shed in the amount of \$2.60. Would you explain that item?

A. I believe that is lath used in holding down the paper about the building. The lumber for the cement shed was brought up from Portland, and it was second hand lumber. The joists of it had been used on airport work, for streets.

Q. Is that other lumber charged in here any place on this job? [1459]

A. It is not.

Q. It is not? A. It is not.

(Testimony of M. C. Schaefer.)

Q. Well, this \$2.60, then, represents only a part of the cost of the cement shed?

A. That's right.

Q. Well, state whether or not the item of \$2.60 would be the actual cost and the reasonable value of that lath or material that you purchased for the cement shed on this job?

A. It is.

Q. And your next item is roofing for cement shed, in the amount of \$23.50. I'll ask you if that is the actual cost and the reasonable value of the roofing that went into the cement shed for use in the performance of 1062?

A. It is.

Q. Now, when this job was over what happened to the cement shed?

A. The cement shed stayed on the property. That was the agreement, as I understood, that any shed that we might build would have to remain on the property?

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, all of it except that it would remain there. That will stand.

Q. Now, your next item of travel expense in the amount of [1460] \$67.57, I will ask you whether or not that is the actual cost and the reasonable value of travel expense actually incurred and required in connection with the performance of 1062?

A. It is.

Q. Now, your next item of miscellaneous expense, I will ask you if that sum of \$144.21 is the actual cost and the reasonable value of the miscel-

(Testimony of M. C. Schaefer.)

laneous items as related from the stand by Mr. Hendershott, that went into the actual performance of 1062? A. It is.

Q. And the next item of bond, \$393.90, I'll ask you if that is the actual cost and the reasonable value and is the premium charged in connection with the performance bond you gave under your 1062 sub-contract? A. It is.

Q. The next item of engineering expense of \$201.25, would you explain what that was?

A. That was for Mr. C. E. Hewitt's service in making his computations of excavations on 1062.

Q. Is that with reference to the exhibit which has been introduced into evidence?

A. That is correct.

Q. And is that item the actual amount charged and paid by you to Mr. Hewitt? [1461]

A. It is.

Q. Now, your next item of legal expense in the amount of \$533.57, state what that is.

A. That is McKelvey, a bill for legal expense.

(Whereupon, Statement for legal services, McKelvey, was marked Plaintiff's Exhibit No. 71 for identification.)

Q. Handing you plaintiff's identification 71, would you state what that is, please?

A. That is McKelvey's statement for legal services, in connection with 1062.

Q. In connection with 1062?

A. That's right.

Mr. Olson: We offer plaintiff's identification 71 in evidence.

(Testimony of M. C. Schaefer.)

Mr. Holman: I object to it, your Honor, as having no probative force in this action under the issues as framed, also for the reason that it is not itemized sufficiently to advise the other parties litigant as to the contents or the time, the period during which the services were rendered, and also that it is a self-serving document submitted to the party by his own attorney.

The Court: Objection overruled. It will be admitted. [1462]

(Whereupon, Plaintiff's Exhibit No. 71 for identification was admitted in evidence.)

Q. During what period of time were these services rendered, Mr. Schaefer?

Mr. Holman: Now, may it please the Court, I object to any inquiry on that, because if they introduce the document as the proof, then certainly the deficiencies of the document can't be supplied by oral testimony other than by the one who prepared it.

The Court: I'll retract my admission of the exhibit; overrule the objection. You may show when it was, if you wish.

Q. Mr. Schaefer, did you personally secure the services of Mr. McKelvey? A. I did.

Q. And do you know approximately when you secured his services?

A. I believe it was in October of '44.

Q. Then are you able to state, Mr. Schaefer, approximately when the services covered by that state-

(Testimony of M. C. Schaefer.)

ment, being plaintiff's identification 71, were rendered by Mr. McKelvey and his office?

A. Well, from the time I employed him to the completion of his part of the work, and that was in October of '45.

Q. You say you first went to him in about October, 1944? A. I believe that is correct.

Mr. Olson: We again offer, then, in evidence, plaintiff's identification 71.

Mr. Holman: May I ask a question of the witness?

The Court: Yes.

Voir Dire Examination

By Mr. Holman:

Q. Was Mr. McKelvey's services, were they obtained before or after you had made application for arbitration under the sub-contract?

A. They were before.

Q. Before; then you made application for arbitration under the sub-contract under the advice of Mr. McKelvey? A. That's right.

Q. And did Mr. McKelvey give you any advice with reference to the type and the manner of performance of the job, after October, 1944?

A. He did not.

Mr. Holman: Then I raise the same objection I did before, your Honor, that it is not a job cost, but is litigation cost, and therefore is not a proper item in this compilation of Mr. Hendershott.

The Court: I'll overrule the objection. I might say that the admission, or ruling of the Court ad-

(Testimony of M. C. Schaefer.)

mitting the evidence, these documents relating to the items here, is not a ruling that they are costs properly chargeable [1464] against this job. They are admitted in evidence, and the effect of them will be passed on later.

Mr. Holman: I understand.

(Whereupon, Plaintiff's Exhibit No. 71 for identification was admitted in evidence.)

The Court: We'll take a recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, the next item on your exhibit 63 is overhead expense, 20 per cent of the total of the direct costs, being the total of the items immediately preceding the item of overhead expense, totalling in the overhead expense charged to this job \$13,582.82, being the items as enumerated by Mr. Hendershott. I'll ask you whether or not that is the reasonable value of the items of overhead expense chargeable to the performance of 1062?

Mr. Holman: To that question I object, your Honor, for the reason that the witness has already adopted the opinion of the compiler of the statement as a fixed item, and therefore it is not one subject to determination as to reasonableness. If your Honor will recall, Mr. Hendershott's testimony

(Testimony of M. C. Schaefer.)

was that he regarded that as a fair basis of charge.

The Court: Yes, I remember his testimony. However, it is based upon an allocation, or supposed to be, I think, although an arbitrary one, in some respects, of the costs of the main office.

Mr. Holman: That is my sole point, your Honor.

The Court: I'll overrule the objection. He may answer for what it is worth.

Witness: It is: I'd say if anything it is a bit low.

Q. Now, the item of profit, 10 per cent, \$8203.05, what is that item, Mr. Schaefer?

A. That is for my services.

Mr. Hawkins: Your Honor, I object to that question. I think that is wholly immaterial. In any event, I know of no agreement of any kind whereby Mr. Macri promised to pay 10 per cent, either the written sub-contract or this so-called oral agreement.

The Court: Well, this question, I think, was—what was that you're asking, what it was? I'll overrule the objection. Had you answered the question? A. Yes.

Mr. Olson: He said it was for his services.

The Court: Yes.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, I'll ask you, Mr. Schaefer, whether or not that amount, \$8203.05, together with any amount

(Testimony of M. C. Schaefer.)

that may be [1466] included in the previous 20 per cent overhead expense for your services, is the reasonable value of your services in connection with the performance of 1062?

Mr. Holman: Objected as calling for a self-serving statement, your Honor, asking the man to give his opinion as to the value of his own services.

The Court: Overruled.

A. It is.

Q. Now, I'll ask you the general question, then, Mr. Schaefer, as to whether or not the items shown on plaintiff's Exhibit 63 were reasonably required in the actual performance of 1062?

A. They were.

Q. Now, Mr. Schaefer, when did you first start out in the contracting business?

A. Well, I started doing——

Q. Construction work?

A. ——I started doing carpenter work on April 13, 1922, I think it was on a Thursday, at 7:30 in the morning.

Q. And how long did you work in the—you stated you started out as a carpenter?

A. That's right.

Q. How old were you then? A. 15.

Q. And go ahead and relate just what your experience has [1467] been in the construction and contracting business.

A. Well, I started out working for an uncle, and then my father went back into the construction game, and I worked with my father. Then in April,

(Testimony of M. C. Schaefer.)

1924, I worked as a stair builder in Chicago, first building about five stairs, and after that I was layout man for the field or for the job operations; there was 15 stair works. That job lasted until December of '24. Through '24 and '25 I worked as carpenter and carpenter foreman, doing some of the estimating for my father's construction company. It was A.M. Schaefer and Sons at that time. In 1926, 1927, 1928, 1929 and 1930 I did all of the estimating and purchasing of materials, the handling of sub-contracts, and getting of the material and sub-contractors and men to the different jobs. In 1930 through 1936, those were depression years, and I did quite a bit of H.O.L.C. repair work. There's some work of remodeling for Lakeview Cartage Company and for Curtis Candy Company. At that time I also went to Chicago Technical College and took a course of estimating. From November of 1936 to June of 1938 I did estimating for Zuker Concrete Construction Company in Portland.

Q. For who?

A. Zuker Concrete Construction Company. From June '38 to February '40 I did estimating as a profession. From 1940 [1468] to date I operated my own business, which is Concrete Construction Company, in Portland.

Q. You say in 1938 to 1940 you did estimating as a profession?

A. That's correct.

Q. Just what was the nature of that?

A. Well, I did estimating for a number of general contractors. I prepared their bids, took off

(Testimony of M. C. Schaefer.)

the materials, priced the work, made up the bid forms, all on a percentage basis, percentage of profit basis.

Q. Now, did that work include concrete work?

A. It included concrete work and general building construction.

Q. Now, you say since 1940 up to date you've had your own business? A. That's correct.

Q. And that business has been what?

A. That business has been concrete and general construction. My experience in construction has been the building of churches, schools, residences, stores and apartments, small bridges, small dams, culverts and head walls, dairy plants, airport warming aprons and tie-down slips, manholes, catch basins, inlets, gas regulator vaults, electric regulator vaults, garages, public and private——

Mr. Holman: What are you reading from?

A. This is a memo I made up. [1469]

Mr. Holman: Prepared when, for the purpose of testifying?

A. Just so as to give a list of my experiences.

Q. Go ahead.

A. Electric regulator vaults—well, I read that; service stations, a bus depot, we did work for a number of chemical plants, there's curbs and gutters, sidewalks and retaining walls, concrete posts, banks, foundry, ship ballasts, floors and scullers of ships. We did on the main Walla Walla Farm Labor Camp we did all the Concrete work, that was in 1940, I believe, which included silo——

The Court: What was that last word?

(Testimony of M. C. Schaefer.)

A. Silo, and a sewage plant. We did concrete work at Pendleton and Hermiston. There was reservoirs and target butts at Camp Adair, fire walls for the oil companies, swimming pools, laminated wood sawdust bins, pump house at Sauvi's Island, and there is just a variety of other work.

Q. Now Mr. Schaefer, getting down to concrete structures to be installed on 1062, I'll ask you what is the—what lateral clearance would be reasonably required in excavations in order to enable a reasonably skillful and able contractor to assemble and install forms and panels?

Mr. Holman: Just a minute, your Honor, Objected to as having been already covered by this witness. He's [1470] given his opinion before.

Mr. Olson: I don't think I asked him.

Mr. Holman: Oh, I'm positive he's testified as to the distance out, and as to the slope, and everything else.

The Court: He testified what they were, but I don't believe he's expressed an opinion as an expert as to what is reasonably necessary. I'll overrule the objection.

A. The proper——

Mr. Olson: Wait a minute; I'm only about half through.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I want to object to the question further, your Honor, that in his question itself he's

(Testimony of M. C. Schaefer.)

asking Mr. Schaefer to confirm himself as a reasonable and experienced contractor.

The Court: Well, he isn't testifying about himself. He's testifying as to a hypothetical contractor. Let's have the question completely asked, then make your objection, and I'll rule on it. You hadn't finished asking your question yet, had you?

Mr. Olson: No. It isn't a sentence yet, I don't think. I'm sorry, Mr. Taylor. [1471]

(Whereupon, the reporter again read the last previous question.)

Q. (By Mr. Olson): —in those excavations, and to remove the concrete panels and forms from the concrete structures after the concrete had been poured in the forms?

Mr. Holman: I object to the question, your Honor, first as calling for the opinion of this witness, who is a party litigant, propounded to him as a purported expert, asking for an answer to a hypothetical question without including all the elements of a hypothetical question that to date have been brought into issue by the testimony in the case, and specifically eliminating from the question the specifications of the Bureau of Reclamation involved and brought into this case, and further, for the reason that while it purports to be a question propounded to an expert, it is actually and for all practical purposes a self-serving statement by this witness, a party litigant, with respect to the performance of his own job, no matter how it is couched, therefore it is an improper question.

(Testimony of M. C. Schaefer.)

The Court: Is it your position that a litigant may not testify as an expert, even though he's qualified?

Mr. Holman: He may, your Honor, but you can't have a personal basis directly tied to an issue before the Court. It is my position, your Honor, that an expert [1472] witness can give his evidence for the guidance of the Court, but an expert cannot give his opinion upon a finding of an issue that is for the Court to determine, and that is what this question purports to find from this witness. It purports to ask Mr. Schaefer "What did you need to do this job?".

The Court: Well, he's asking what a hypothetical contractor would require.

Mr. Holman: It is couched that way, your Honor, but it is very slightly veiled.

The Court: Objection overruled.

Q. I would like to include in my question, in answering that hypothetical question just asked you, Mr. Schaefer, I am referring to the concrete structures as shown on the structure lay-out plan, being plaintiff's exhibit 12.

The Court: I'm not sure that I gave you a chance to object, Mr. Hawkins. It is understood, of course, that the others join.

Mr. Hawkins: Yes; I have no further reasons to point out.

Witness: If it is to be a lateral clearance without slope, the lateral clearance should be not less than three feet.

(Testimony of M. C. Schaefer.)

Mr. Holman: I move that the answer be stricken as not responsive, your Honor. [1473]

The Court: Overruled; denied, I mean.

Q. Now, assuming the same set of facts, Mr. Schaefer, and assuming that the banks opposite that portion of the concrete structure requiring an intervening form are sloped, what slope and what lateral clearance could be reasonably required for the same purposes, in that case?

Mr. Holman: Same objection.

The Court: Overruled.

A. One foot out at the base of the structure, and on a 1 to 1 slope.

Q. Now, referring to the sub-contract covering 1062, having in mind the specifications covering 1062, being plaintiff's exhibit 3, and the structure lay-out plan, being plaintiff's exhibit 12, and assuming that you have excavations furnished and provided which had a lateral clearance in cases where the bank was—a lateral clearance of three feet in cases where the banks were vertical at all points where intervening form was required between the bank and the concrete structure to be installed, or assuming that you had a lateral clearance of one foot at the foundation of the structure outside of the neat line of the concrete, with a slope of the bank of 1 to 1 from the foundation of the excavation to the surface of the ground at all points where an intervening form was required to be inserted between the concrete and the [1474] bank, and assuming further that the floors of the excavations

(Testimony of M. C. Schaefer.)

were hand graded so as to be to the proper grade, sub-grades and elevations, and of the proper form to receive concrete in accordance with the structure lay-out plans and specifications, and assuming further, Mr. Schaefer, that the excavations were provided timely, so that you could proceed, or so that the contractor could proceed with the installation of the forms and the pouring of concrete without delay, and assuming further that the form lumber being furnished by someone else was furnished timely and of a quality suitable for use in the performance of, or in the building of the panels and forms for this structure, for these type of structures, and assuming that the sub-contractor was required to furnish the labor and necessary equipment to do all of the concrete work, form work, to cut, bend and install all re-inforcing steel, all such work to be as shown on the specifications 1062, and that the sub-contractor was required to scrape and clean the concrete forms, remove the nails from same, and pile the same in neat piles after the concrete has been poured, the forms upon completion of the job to be the property of the general contractor, and assuming that the sub-contractor was required to furnish the wire, the nails, and the curing materials, and none of the other materials, what in your [1475] opinion, Mr. Schaefer, would be the reasonable cost and value of the performance of that work by a reasonable, able and skillful contractor, as called for in those specifications and the structure lay-out plan?

(Testimony of M. C. Schaefer.)

A. That would be \$26.00 a cubic yard of concrete.

Q. Did you make a detailed estimate, Mr. Schaefer, before you executed plaintiff's exhibit 5?

A. I did.

Q. Do you have that with you?

A. I have.

Q. Assuming that the same contractor was to— by the same contractor I mean a reasonable, able and competent sub-contractor, in addition to pouring the concrete under those circumstances, was to furnish the form lumber, what would be the reasonable value of that additional service, of furnishing the form lumber?

Mr. Hawkins: I don't see the materiality of that, and I object to it.

Mr. Holman: I join, your Honor.

The Court: Isn't that bringing in a condition that doesn't exist here?

Mr. Olson: It does, your Honor, and I'll state my position on it. Your Honor will recall that on this other contract that was practically all fours with this one, testified by Mr. Bufton, apparently the price was [1476] \$30.00 a cubic yard, and the only difference between that job and this job was apparently in that job the sub-contractor was furnishing the form lumber. That's the purpose of this question.

The Court: I'll overrule the objection and let it in for that purpose only.

Witness: That would run about \$4.00 a cubic yard.

(Testimony of M. C. Schaefer.)

Q. Did you have some discussion with Mr. Macri about whether you would furnish the form lumber or not? A. I did.

Q. And was that figure of \$4.00 per yard discussed with Mr. Macri?

A. I did—that was discussed with him.

Q. Now, Mr. Schaefer, with reference to specifications 1068, and your sub-contract, being plaintiff's exhibit 6, you went over the plans and specifications covering 1068, did you not? A. I did.

Q. Being plaintiff's exhibit 4, and the structure lay-out plan covering 1068, being plaintiff's exhibit 13—

Clerk: No structure lay-out plan on 1068 in evidence, unless it is included in this one.

Q. Did you go over the structure lay-out plans covering 1068 too, Mr. Schaefer? A. I did.

Q. And then also having in mind your plaintiff's Exhibit 6, being the sub-contract, under which contract you were to furnish all labor and necessary equipment to do all the concrete work, form work, structural timber work, cut, bend and install all reinforcing steel, all such work to be as shown on the plans and as specified in specifications 1068, Roza Division, and were to clean all concrete forms, to remove the nails from the same, to pile the same in neat piles, forms and form lumber at the completion of the job to remain the property of the general contractor, the work to be done in strict accordance with the plans and specifications and under government inspection to the satisfaction of

(Testimony of M. C. Schaefer.)

the general contractor, and that all materials except the form wire, nails, and curing materials were to be furnished by the general contractor, and the sub-contractor, being yourself, to furnish the wire, nails, and curing material, and the general contractor to furnish the form lumber, and assuming that you were to receive a compensation of \$35.00 per thousand board feet of structural timber placed, \$28.00 per cubic yard for concrete installed, 2 cents a pound for re-inforcing steel in place, gates and miscellaneous iron work at 3 cents a pound in place, and assuming that the excavations on 1068 into which the structures referred to in the specifications and structure lay-out plans were to be placed were [1478] excavated as you have stated would be reasonably required namely, to a three feet lateral dimension clearance if the walls were vertical, or to a lateral dimension of one foot outside of the neat line of the concrete at the foundation of the structure and with the banks from the foot of the structure or the foundation of the structure at a 1 to 1 slope at all points where intervening concrete form had to be installed between the concrete and the bank, and assuming further that the excavations were furnished and provided sufficiently in advance of your work so that you could install the panels and forms and pour the concrete without being delayed, and assuming further that the floor or foundation of the excavations were so excavated as to be ready to receive concrete in accordance with the specifications and structure lay-out plans,

(Testimony of M. C. Schaefer.)

with proper sub-grades and elevations provided, and assuming further that the lumber to be furnished by the prime contractor as read from the sub-contract was furnished timely and as needed, and without delay, and of the quality suitable for those operations, I'll ask you then, Mr. Schaefer, what profit would you reasonably have received or would you have received, or by what amount, if any, would the price called for in the sub-contract, as I read, exceed your cost, your reasonable cost, in the performance of 1068? [1479]

Mr. Holman: Your Honor, I would like to interpose the same objections as were previously interposed as to 1062 answers by this gentleman upon the hypothetical question, plus the additional objection that in the case of 1068 the record affirmatively shows that this gentleman in his operations was de-barred by notice from proceeding with the work, and therefore this interrogation is immaterial and irrelevant, and outside of the issues with respect to the performance features of that job, and the direct proof, and the only true proof, could be the difference between the basis of his bid and the reasonable value for performance of the job, and the resulting profits therefrom. This question I submit is not within that scope.

Mr. Hawkins: Your Honor, I would like to add to the objection that any answer that this witness gives is purely speculative as to any profit that might ensue; there's been no testimony that this witness has ever showed a profit on a similar job.

(Testimony of M. C. Schaefer.)

Mr. Olson: Your Honor, as to Mr. Holman's objection, as I pointed out previously the evidence was that the defendants unlawfully took over the 1068 and started performing it themselves, without ever having given us an opportunity to perform 1068. The testimony shows that the first hand excavations wasn't had until February 5, [1480] 1945.

The Court: Well, I think that it is proper under the issues here to show loss of profit, but the thing that I am somewhat doubtful about, it seems to me, I may have been mistaken in following your long question here, it seemed to me that you had some elements mixed in there; didn't you base this on a reasonably competent and experienced sub-contractor? I thought you were starting out to ask what would be the difference between the bid price and the reasonable cost of performance here by a hypothetical sub-contractor, and ended up with what this sub-contractor, Mr. Schaefer, would have made.

Mr. Olson: Well, perhaps yes, maybe I did get it mixed up. I can clarify that, I think, your Honor, because I was intending to ask the difference between the bid price and what would have been received, the bid price and what was the cost of performance by a reasonable, competent sub-contractor.

The Court: Under the conditions that you stated?

Mr. Olson: Yes.

The Court: But toward the last of the question you injected an element there of asking Mr. Schae-

(Testimony of M. C. Schaefer.)

fer what profit he would have made. I'd like to have it just understood which one you're asking here, and then we can decide whether or not it is proper. [1481]

Mr. Olson: I think that's true, your Honor.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, in answering the question, I wish you to exclude yourself as an individual on the thing, and answer the question as to the person performing the contract, what it was to the person performing the contract, being one who is a reasonably skilled, able, and competent sub-contractor.

The Court: It is understood that the objections still stand to the question, of course. Overruled.

A. Yes; oh, that party should have made \$8500.00.

Q. \$8500.00? A. Yes.

Mr. Holman: I take that to mean as a profit on this job.

The Court: Yes, I think that is sufficiently clear. What is the amount claimed here for loss of profit on 1068?

Mr. Olson: Your Honor, it isn't that much. It's \$5,000.00.

The Court: That's what I thought. I just wanted to be sure.

Mr. Olson: You may examine.

The Court: Well, I think it is a little late to start cross-examination now. [1482]

L. R. HENDERSHOTT

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. Olson:

Q. Mr Hendershott, with reference to the miscellaneous item on plaintiff's Exhibit 63, do you now have the breakdown on that item?

A. Yes; the telephone calls, \$61.12; pictures and films, \$16.30; first aid supplies, \$12.81——

Mr. Holman: Would you go a little slower? May I have that second figure, pictures and films?

A. \$16.30; first aid supplies, \$12.81; water from the city [1483] of Sunnyside, \$10.50; plan cover, 45 cents; snake bite remedies, \$4.38; bale of hay, \$2.40——

Q. Do you know what that bale of hay was used for? I don't suppose you do.

A. By hearsay only.

Q. All right, go ahead.

A. Sacks, \$3.32——

Mr. Holman: Sacks, did you say?

A. Sacks.

Mr. Holman: Cement?

A. No, those were the ones the finishers used, when they were finishing; post office box rental, \$1.80, postage, \$10.87; stationery, \$2.28; express charges, \$2.75; bridge tolls, \$4.15; and unidentified items of \$11.08.

(Testimony of L. R. Hendershott.)

Mr. Holman: Those bridge tolls are paying tolls, crossing a bridge? A. Yes.

Mr. Olson: That's all.

The Court: Do you wish to inquire into those items on cross-examination?

Mr. Holman: I do not, your Honor.

Mr. Hawkins: No examination.

(Whereupon, there being no further questions, the witness was excused.) [1484]

M. C. SCHAEFER

the plaintiff, resumed the witness stand.

Mr. Olson: Mr. Schaefer is on for cross-examination.

The Court: Yes, that's right. We're ready for cross-examination.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, the item of \$14.00 for towing the Mixomobile paid to Benton County, and shown by a photograph in 49, one of the sub-numbers, was it not? A. That's right.

Q. Referring specifically to sub-numbers of plaintiff's exhibit 49, picture 20 and picture 23?

A. That is correct.

Q. And that date of 3/10/45, March 10, 1945, marks the time that that towing was done?

A. That's right.

(Testimony of M. C. Schaefer.)

Q. Now, was that towing done at that time because the Mixomobile [1485] did not have the capacity to pull itself?

A. The road condition was such, yes.

Mr. Holman: I move that the answer be stricken, your Honor. I didn't ask him as to the road condition. It is not responsive.

The Court: I don't know whether it was responsive or not.

(Whereupon, the reporter read the last previous question and answer.)

The Court: Well, I take his answer to mean that it couldn't pull itself because of the road condition.

Witness: That's correct.

Mr. Holman: That's what he says, yes.

The Court: The motion to strike will be denied.

Cross-Examination

(Continued)

By Mr. Holman:

Q. In other words, the pictures 20 and 23 indicate a location of the Mixomobile in a spot where the Mixomobile could not propel itself upon the character of track there available on March 10, 1945, correct? A. That's correct.

Q. What was the capacity of the Benton County truck? A. I don't know.

Q. Oh, you were not there, sir? A. No.

Q. All right, sir. Your accountant, Mr. Hender-shott, indicated [1486] the small tools as expendable, is that correct? A. That is correct.

(Testimony of M. C. Schaefer.)

Q. The form oil is put on with respect to the time the panel is completed?

A. After the panels are built the forms are oiled.

Q. Then? A. That's right.

Q. As part of the same general construction operation?

A. Well, the first time they were oiled in the yard.

Q. Yes. A. That's right.

Q. Now, if the panels had immediately been placed in structure and concrete had been immediately poured, the one oiling would be sufficient, would it not? A. Not for the job, no.

Q. Sir? A. Not for the job.

Q. It requires two oilings, sir, or how many oilings?

A. It would require, depending on often those particular forms were used.

Q. Well, assuming that a new form had been built in the yard, and had been oiled with form oil, and had been set in a structure currently, without delay, and the concrete had been poured currently, without delay, would it be necessary to re-oil the form? [1487]

A. Yes, that is, after that pour, before the second pour was made.

Q. Before the second pour of course you would have to remove the concrete, and then re-oil?

A. You would probably re-oil again then, and

(Testimony of M. C. Schaefer.)

the form then would probably be good for three or four more uses before being oiled again.

Q. You would, however, have to remove the concrete, that's true?

A. Well, that would be a very minor operation.

Q. Well, regardless of how minor it is, you would have to remove any concrete that cohered, wouldn't you, I mean adhered?

A. That's right.

Q. With reference to plaintiff's Exhibit 70, \$83.50 for these plugs, the first charge upon your compilation—do you have a compilation there?

Mr. Hawkins: That's Exhibit 63, isn't it, Mr. Clerk?

The Clerk: That's right.

Q. —is for the month of September, 1944, is it not, under that item of hardware?

A. That's correct.

Q. And that would indicate, would it not, that during the month of September, or at least within that immediate [1488] vicinity, this work had been done, fixing these plugs? A. That's right.

Q. And that's work that Concrete Construction Company did themselves, isn't it?

A. We had these plugs built by a sheet metal man.

Q. Oh, I see, you had them built? A. Yes.

Q. Now, the spraying material you said was to prevent the evaporation and so forth?

A. That's right.

Q. Would that be required in the event that the operation contemplated a continuous one of building

(Testimony of M. C. Schaefer.)

the forms, setting them in the excavation, pouring the concrete, one, two, three, concurrently?

A. Yes, the Hunt Process or sealcure was required on all structures, no matter what the rate of pour was.

Q. In other words, it is a recognized ingredient, expendable ingredient, in the fixing of concrete structures? A. That's right.

Q. And regardless of how expeditious or how dilatory the progress is from the construction of the panels to the pouring of the concrete?

A. That's correct.

Q. The Sisalkraft paper was paper which you used, did you not, in the wintertime to prevent the freezing of concrete [1489] structures on account of the water content in the concrete?

A. Well, it was used for that, and——

Q. Isn't that correct, sir?

A. That's correct.

Q. And that was the first time you purchased that, did you not? When did you purchase the Sisalkraft paper?

A. The Sisalkraft paper was purchased in July, and it was also used for protection against the sun, the rapid evaporation of water out of the concrete.

Q. Then it also is a current, expendable item, necessary for the completion of the structure?

A. Correct.

Q. Regardless of the weather, sir?

A. Correct.

Q. Now, is it not a fact that you started your pouring on July 31, 1944, and that from the line-out

(Testimony of M. C. Schaefer.)

of the job at that time you knew that your pouring would go through the winter?

A. That isn't necessarily true, no.

Q. Not necessarily true; all right, sir; and the Sisalkraft paper was not bought as a precaution for the time that you knew you would encounter freezing weather?

A. No, it was purchased at the time for sun protection.

Q. Is is put on the form, or is it put on the concrete? [1490]

A. It is put over the concrete; that is, put over the form and the concrete.

Q. It is put over the form with the concrete in it? A. That's correct.

Q. And not put over a form to protect it from the sun? A. No.

Q. Could be used that way?

A. Well, it wouldn't be put over the form without having concrete in it, no.

Q. It wouldn't protect the lumber, but it is for concrete protection only, correct?

A. It is for concrete protection.

Q. And not for lumber?

A. It's never used that way, no.

Q. Now, with respect to this item, \$393.90 for bond, do you have a copy of the application you signed? A. I do not.

(Whereupon, blank form for bid bond was marked defendant Macri's Exhibit No. 72 for identification.)

(Testimony of M. C. Schaefer.)

Q. By the way, Mr. Schaefer, has Mr. Hunter in any manner communicated with you with respect to the application he was to send here?

A. He did not.

Mr. Olson: Your Honor please, I have a letter; I [1491] was going to bring it up at the end; I'll do it at this time if you wish. I have a letter from Mr. Allyn Hunter, which says "Dear Mr. Olson: In regard to sending the bond——"

Mr. Holman: Can we have this off the record?

The Court: Well, perhaps I had better see the letter, then. All right, will you pass this to Mr. Holman?

Mr. Olson: I take it the Mr. Holmes referred to there is Mr. Holman.

The Court: I think so.

Mr. Holman: I'd like to have this marked for identification, your Honor.

(Whereupon, letter Hunter to Olson, March 5, 1947, was marked Defendant Macri's Exhibit No. 73 for identification.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 72, a blank form of application for contract and bid bond of the Glen Falls Indemnity Company, are you able, Mr. Schaefer, to tell me whether or not that is the type of application that

(Testimony of M. C. Schaefer.)

you signed, and directing your attention specifically to the portion in the back, where the undertaking——

Mr. Olson: That is objected to as being immaterial, where or not that's the type of application we [1492] signed, and on the further ground that it is wholly irrelevant to any matter that is in issue in this case.

The Court: Well, I'll permit him to answer it, and decide whether it is admissible or not after he answers.

Q. I haven't offered it yet, your Honor.

A. I wouldn't be able to swear to it. If this is the only form of application, why, then I imagine it's the one that I signed.

Q. But you go no further than to imagine?

A. Well, I couldn't say that that's the form, no.

Q. And with reference to that, I am directing your attention to the Macri Exhibit 34, the bond signed by the Glen Falls Indemnity and not signed by you, that's in evidence now; you recall that bond?

A. I do.

Mr. Holman: Your Honor, in furtherance of Macri's 73 for identification, I want the record to show that I am proposing to have a subpoena duces tecum served upon Allyn R. Hunter for production of that matter I have inquired about before. I don't think it is competent as an exhibit, but I'd like to have it kept in the record. Just one second, may it please the Court.

(Testimony of M. C. Schaefer.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. You have no copy of the application you signed, Mr. Schaefer? [1493]

A. For bond? No, I don't.

Q. Handing you what has been marked Macri's identification 68, for a total of \$35,745.73 of claim by you, I'll ask you whether or not you transmitted that in due course of mail from your Concrete Construction Company office to Macri and Company at his Seattle office?

A. I wouldn't say as to whether I mailed it to Macri and Company, or whether I mailed it to McKelvey.

Q. But you did prepare and issue it with directions that it be delivered to Macri and Company either direct or through McKelvey; in other words, that was prepared for Macri and Company, was it not? A. Yes.

Q. Then, directing your attention to Macri Identification 69, bearing date of August 3, this particular copy as indicated having been mailed to our firm, for a broken down claim for a total of \$43,837.25, your answer would be the same as to that, would it not, that you transmitted that to Macri and Company? A. Yes.

Q. Now, is it or is it not a fact that you did not disclose to your accountant, Mr. Hendershott,

(Testimony of M. C. Schaefer.)

the gentleman who testified here, the contents of either Macri's 68 or Macri's 69?

A. I believe Mr. Hendershott has seen those copies. [1494]

Q. Before he made this compilation which is in evidence as 63?

A. I wouldn't be able to say on that.

Q. Well, can you tell me, sir, whether or not you made these available to Mr. Hendershott before he made the compilation which is in evidence as 63?

A. I wouldn't be able to say.

Q. I'll ask you if it is not a fact, sir, that you did tell Mr. Hendershott that you had billed twice, once for thirty-five thousand dollars, roughly, and the next time forty-three thousand dollars, roughly, and that for the purpose of suit you wanted it at the full amount that could be billed?

A. I did not. Them there were approximations for arbitration only.

Q. Now, did you or did you not furnish Mr. Hendershott, your accountant here, with the breakdown of allocation of labor as expended on the job, or did you merely furnish him the payroll which here is identification 16, the Schaefer payroll?

A. I never gave him the breakdown, the hour breakdown.

Q. All right, sir.

A. He didn't request it, or he would have had use of it.

Q. And with reference to Macri's exhibit for identification 67, notice of levy for ten thousand odd

(Testimony of M. C. Schaefer.)

dollars here, has [1495] that matter been satisfied with the government? A. No, it has not.

Q. All right, sir. In your answer to counsel on the hypothetical questions, where you fixed \$26.00 per cubic yard as a proper and correct unit price for performance of concrete structures, you recall that, do you? A. Yes.

Q. Did you or did you not assume a continuity of proper forms?

A. Yes, I figured on proper material being supplied, and that you would have proper forms, and proper conditions to work with.

Q. And you included in that as one of the component parts the construction of proper forms, correct? A. Correct.

Q. And you included in that, did you not, the exactness of fitting between the form and the fine grading, correct?

A. Will you give me that again, please?

Q. Read it, please.

(Whereupon, the reporter read the last previous question.)

A. It was based on the excavations being properly performed.

Q. Yes, sir; well, regardless of that answer, you've several times here used the term "on the button" haven't you? A. That's right. [1496]

Q. Now, by that do you mean a fine grading to the point that the form will fit as called for by the lay-out plans?

(Testimony of M. C. Schaefer.)

A. So that the concrete is at proper elevation, is right.

Q. So that the concrete is at proper elevation?

A. So that the excavation is at right grade, proper grade, that the excavation is made wide enough outside of the form work.

Q. And that the form itself is made right to fit that? A. That's right.

Q. Now, is it a fact, or is it not a fact, that your forms were always perfect?

A. Forms were perfect?

Q. Yes.

A. Oh, no, not by a long shot they weren't, because they weren't built the way we had designed in the first place; we would have much more use with a whole lot of less cutting off or patching to increase the length of the form panels.

Mr. Holman: Yes, sir; that's all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, I believe you testified that \$4.00 per cubic yard of concrete poured would be a fair allowance, or reasonable allowance, for lumber for building those concrete forms, correct?

A. That's what I told Mr. Maceri at the time, that's what I [1497] figured, about \$4.00, but I didn't want to have anything to do with lumber.

Q. I'm not asking about any conversation; I'm asking you if you did not testify that \$4.00 was a

(Testimony of M. C. Schaefer.)

fair allowance for the lumber per cubic yard of concrete poured, is that right?

A. I believe so, yes.

Q. Now, were you familiar with the lumber market at that time? A. I was.

Q. What price did you pay for lumber per thousand at that time; do you know, sir?

A. Now, then, on that, the price of lumber has been all over the board.

Q. Yes, I realize that.

A. From \$18.00 to \$70.00 a thousand.

Q. Just a moment, Mr. Schaefer, I'm asking you what the price of lumber was at that time.

A. I believe I at that time assumed that the lumber would cost about \$50.00 a thousand out here on the Roza job.

Q. About \$50.00 a thousand on the job?

A. I believe that was roughly it.

Q. Would that include plywood? A. No.

Q. And two by fours? [1498]

A. It would include two by fours and shiplap. It would not include the price of plywood. That's the unit price, of \$50.00. Your plywood there would probably run about eleven to twelve cents a square foot.

Q. Does that \$4.00 figure include the plywood, sir? A. I believe so.

Q. I didn't understand. A. I believe so.

Q. Do you know?

A. No, I don't. I didn't take a right down tight analysis of the lumber at that time.

(Testimony of M. C. Schaefer.)

Q. Then this \$4.00 figure that you gave is a rough estimate, is that right?

A. That's an approximate estimate, yes.

Q. Just an approximation. Now, I believe you also testified at the outset of this trial that a cubic yard of cement would require approximately 150 board feet of lumber?

A. A cubic yard of concrete, it probably would take a little more than that.

Q. It would take more than 150? 200 board feet? If I remember your testimony correctly on the outset of the trial you testified between 125 and 150 board feet.

Mr. Olson: I don't think Mr. Schaefer testified on that, Mr. Hawkins. I think Mr. Larson was asked about the contact footing, but I don't think Mr. Schaefer was. [1499]

Mr. Hawkins: Mr. Schaefer testified to that.

Mr. Olson: I think he did say something about 150 board feet; I believe he did say that.

Q. Per cubic yard? A. Per cubic yard.

Q. Mr. Schaefer, in connection with Exhibit 63, that was prepared at your direction, I believe you said, or at your request, not at your direction?

A. Yes.

Q. Now, with reference to Exhibit 63, you had that in your hands and were looking at it when you testified that each of these figures over on the right hand side were reasonable and fair figures for the work done, is that not right?

A. That's correct.

(Testimony of M. C. Schaefer.)

Q. Yes. Now then, when you testified that \$53,280.87 was the fair and reasonable cost of the labor on 1062, you were looking at this figure shown on Exhibit 63, were you not? A. That's correct.

Q. And your testimony that such figure was fair and reasonable is based upon Exhibit 63, isn't that right, sir?

A. It is based upon my own knowledge of the——

Q. It is based on—— A. Cost—— [1500]

Q. Your own knowledge, sir?

The Court: Wait until he finishes his answer.

A. ——of the labor, as well as that there is the figure taken from the certified transcripts of the payroll.

Q. In other words, it is based on your own knowledge, sir?

Mr. Olson: Your Honor, I think the question's been answered. That's exactly the same question counsel asked him previously and which he answered.

The Court: Well, I'll overrule the objection. It may be somewhat repetitious.

Q. It is based on your own knowledge, sir?

A. I haven't verified that there figure against the certified transcripts of payroll, but I have checked the payroll, and I'm still stating that there is the proper figure.

Q. In other words, if you'll excuse my interruption, the figure that you gave of \$53,280.87 is merely the figure furnished you by Mr. Hendershott, but

(Testimony of M. C. Schaefer.)

that that figure also is reasonably comparable to your own impression of the cost from your own knowledge, is that it? Do I state your position correctly? A. Yes.

Q. Now, then, how many man hours were spent on this job, sir?

A. I can't tell you that without checking back through.

Q. Without checking back through? [1500-a]

A. That's right.

Q. And as a matter of fact you couldn't tell me the actual cost of the labor on this job without either having Exhibit 63 before you or without checking back through, could you? Isn't that right, sir?

A. I'd have to refer to something, most certainly.

Q. Yes, and that's true with each one of the items that you testified to? A. That's right.

Q. You would either have to take the figure given you on Exhibit 63 or check back?

A. Well, I have seen it there, and made comparisons with the accounts.

Q. That is, comparisons with your impression of the accounts?

A. No, I've seen the figures of the accounts.

Q. Yes, you've seen the figures of the accounts, because they're in your office, isn't that right? The accounts are in your office, and you've gone over them from time to time; you're the head of this business, it's perfectly natural that you do that, isn't that right?

(Testimony of M. C. Schaefer.)

A. I've gone over those figures and listed some of the items myself previous to Mr. Hendershott making that survey.

Q. But the point I'm getting at is that the precise figure that you testified to, sir, you could testify to only if you had Mr. Hendershott's compilation before you; you [1501] couldn't remember what those figures were otherwise, could you, sir?

A. No, I couldn't tell you what any of those figures are on that there compilation right now.

Mr. Hawkins: That's right. I think that's all.

Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, after you had your conversation with Macri in which you allege that an oral arrangement was made for extra compensation, did you keep any separate track of the extra costs?

A. Separating the costs?

Q. That's right. A. No.

Q. You have no means, then, of arriving at any figure that could be charged under your theory of the case to Mr. Macri under the so-called alleged oral contract?

A. The oral agreement was that he was going to be paying all the costs. There wasn't a dividing there between that which was contract and which was additional work, and you just couldn't possibly break down the number or give any definite proof that you were only going to be required to make,

(Testimony of M. C. Schaefer.)

we'll say, 25 trips, or 20 trips, from the yard to the job site, and that the rest of the hauling of the forms would be from structure to structure, as compared with the number of trips required and that we would make [1502] from the shop to each structure out in the field and back to the shop again with forms for repair; it's just a physical impossibility.

Q. Can you by date fix a time and place after which you assume that the original contract was abrogated and a new oral contract was substituted?

Mr. Olson: I don't think this is a proper cross-examination of this part of the witness's testimony, if the Court please.

The Court: Well, he didn't go into that this time but I'll permit the examination to go on.

Witness: That was April 29 in the field, on job 1062, and again a verification of that on June 15.

Q. What was that last, pardon me?

A. On June 15.

Q. Will you read to me, Mr. Reporter, what he said just prior to June 15?

(Whereupon, the reporter read the answer of the witness, as follows: "That was April 29 in the field, on job 1062, and again a verification of that on June 15.")

Q. Which date have you selected, Mr. Schaefer, June 15 or April 29?

A. Well, it was April 29, was the first agreement, and then the other was a verification of it.

Q. And your claim is an abandonment of the

(Testimony of M. C. Schaefer.)

original contract [1503] after June 29—after April 29, is that correct?

A. My claim is that we had then an oral contract.

Q. You what?

A. I say, my claim is that we then had an oral contract.

Mr. Ivy: That's all.

The Court: Any redirect?

Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, in response to Mr. Holman's question as to whether or not the forms were always perfect, you said they were not. Will you state why?

A. Well, the forms weren't perfect because the lumber wasn't perfect; we didn't have proper lumber to make the absolute proper form.

Q. Now, with reference to the labor charge that Mr. Hawkins was asking you about, Mr. Hender-shott testified, I believe, that they were made up from the certified copies of the payrolls. Did you see those payrolls weekly, that I understand were certified by you?

A. I saw the payrolls, yes.

Mr. Holman: He didn't answer your question.

A. Well, the certified payrolls.

Q. Yes.

(Testimony of M. C. Schaefer.)

A. I saw the certified payrolls immediately after being made up, yes, and the payrolls——

Q. Were you through? [1504]

A. ——and the payrolls each week.

Q. The amounts shown on there for the labor, was that the prevailing wages at that time for the type of labor shown on your particular payroll?

A. Yes.

Q. And is that the reasonable cost of the labor at that time? A. It is.

Mr. Olson: That's all.

Mr. Holman: May I ask a recross question, your Honor?

The Court: Yes, all right.

Recross-Examination

By Mr. Holman:

Q. Did you in answering me, Mr. Schaefer, intend to inform me that the only forms that were not perfect were those that had improper lumber in them? Now, is that your intention, sir?

A. There are naturally some small errors in building forms. It's just inherent, and there wouldn't be anything unusual about that, but the unusual part of it is that we didn't have the type of lumber to make forms that we would have on that job, and further, we were required to build the forms to a specified length instead of to greater length so that they could have been used to more variety or length of structure wall.

(Testimony of M. C. Schaefer.)

Q. But is it or is it not a fact, sir, that there were [1505] improper forms sent out on that job, as a result of your own carpenters not building them properly? A. Not to my knowledge.

Q. Not to your knowledge, sir?

A. No, sir.

Q. Well, were they corrected? Were these errors in your yard corrected before they went out?

A. Not to my knowledge. There were forms in our yard that had been built for structures ahead, and we had to tear them apart to build forms for structures that we needed immediately, because we had a lack of lumber in the yard, if you want to get to that.

Q. Mr. Schaefer, I'm specifically asking you, sir, whether or not your own carpenters improperly built forms? A. Not to my knowledge.

Q. And how far does that knowledge extend, Mr. Schaefer?

A. To any time that I was around the job site or around the office.

Q. Have you gone over your current job reports, the reports made from Mr. Waltie and Mr. Darcy, the foremen, to you in Portland?

A. I've gone over them, yes.

Q. Yes, sir, and you tell me that not to your knowledge were there any improper forms built?

A. There may have been a boner pulled, and that's a thing [1506] that you would expect on a job like this.

Q. Now, counsel asked you, Mr. Schaefer, if you

(Testimony of M. C. Schaefer.)

saw your payrolls weekly, and in answering him you didn't answer as to weekly. Now, what is the fact as to whether you saw your payrolls weekly?

A. The payroll I did see weekly, but the transcripts of payroll, I saw them after they were made up, and they weren't made up weekly.

Q. No, sir; Mr. Schaefer, isn't it a fact that you didn't make up any payroll and certify it to send to the government from March 9 until October 18, and on October 18 you swore to all payrolls up to that time, is that correct or not?

A. I believe that's right.

Q. Yes, sir, and not until October 20, 1944, was there a single payroll of any kind in the office of the Bureau?

A. Up to what time?

Q. October 20.

A. That might be true.

Q. Well, let's see——

A. I believe that is according to the testimony I gave before, but I'll state here too that that isn't the usual thing.

Mr. Holman: I move that last be stricken, your Honor, as volunteered.

The Court: Yes, it will be stricken. Your counsel can bring out explanations if he wishes.

Mr. Hawkins: No recross.

Mr. Ivy: No.

The Court: Do you have anything further?

Mr. Olson: No, your Honor. That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: If your Honor please, the plaintiff rests.

The Court: I assume there are motions you wish to make here. Would you like a recess first?

Mr. Holman: I think it would be very desirable. I'm willing to go ahead, whatever your Honor prefers, or later; recess or whatever your Honor prefers.

The Court: Well, if you're ready to present your [1508] motions we may as well proceed, until the regular recess time at quarter to three.

Mr. Holman: May it please the Court, the plaintiff having rested, both on his proof with respect to the pleadings as framed pertaining to specification 1062, schedule 1, and pertaining to specification 1068, as likewise fixed by the pleadings, the defendants Macri move for a dismissal of the action pertaining to specification 1062, schedule 1, on the following grounds and for the following reasons: That under the provisions of the sub-contract covering specifications 1062, plaintiff's Exhibit 5, it is provided in subdivision 18 of Article I as follows: I'm reading from my own copy, your Honor, so that if your Honor wishes to follow——

The Court: What part are you reading from now?

Mr. Holman: I'm reading from subdivision 18 of Article I, which is found on page 3, your Honor. Now, going back through the context, I read this to your Honor formerly: "The sub-contractor shall at his own expense do or cause to be done all of the following things in accordance with the provi-

sions of this agreement." That is the very start of Article I, then getting to this specification 18:

(Whereupon, counsel read subdivision 18 of Article I of plaintiff's Exhibit 5 to the Court.)

Mr. Holman: Coupled, your Honor, with provision 7 on page 2 of this same Article I, again specifying what the sub-contractor is to do:

(Whereupon, counsel read subdivision 7 of Article I of plaintiff's Exhibit 5 to the Court.)

(Argument to the Court.)

The Court: What I was trying to get at, was, who is the moving party under the pleadings here, of 1068, who has the burden of going forward with that? I don't know that we ever threshed that out entirely. The thought I had in mind, there has been evidence on both questions on the part of the plaintiff, but the thought I had in mind was, how could I, if I were in accord with the position of the defendants here, how could I at this stage grant a motion for dismissal, when concededly Mr. Schaefer has some \$14,000 coming on his sub-contract on 1062? I would have to assume that Mr. Maceri was going to win on the 1068 controversy, and recover more than \$14,000, wouldn't I?

Mr. Holman: I think that is correct.

The Court: So it seems to me we're having sort of a dress rehearsal in this argument. I have no particular objection to it. I like to get the position of the parties.

Mr. Hawkins: Under those circumstances, I think [1510] I will make my motion, and withhold

a lengthy argument until the close of the case. I move on behalf of the defendants Goerig and Philp, I challenge the sufficiency of the evidence introduced by the plaintiff, and move the Court for the entry of non-suit, dismissing the plaintiff's case in both of the actions now before the Court. As I understand it, the plaintiff Schaefer in 1062 is suing for damages and for his services, and so forth, and he is also in these actions suing for damages as a result of his claimed, or Macri's claimed breach of specification 1068, and it is our position that there has been no sufficient evidence introduced whatsoever in either of these cases to hold the defendants Goerig and Philp, for the reasons I have hinted at during the trial, and I think I argued them at some length in the other cases started on the 19th of February, 1947.

Mr. Ivy: If your Honor please, I think that the position of the Continental Casualty Company as to 1062 is a little different than the other two defendants, in view of the pleadings, which refer entirely, as far as the Continental is concerned, to 1062.

The Court: Yes, that's right.

Mr. Ivy: And so, on behalf of the Continental Casualty Company, I move for dismissal of them as to 1062, the only case in which they have been joined as far [1511] as the pleadings are concerned here.

The Court: But don't the pleadings show here that Schaefer is entitled to about \$14,000, in any event, on 1062, under his original sub-contract?

Mr. Ivy: If your Honor holds that it is under the original contract, that is correct, and the line taken by Mr. Hawkins would be the proper thing at this time for the Continental. However, an examination of the pleadings, your Honor——

The Court: I think the pleadings are not a suit on the contract, that's true.

(Argument to the Court.)

The Court: Well, I think that without passing upon these questions definitely one way or the other, at this time, I think that under the state of the pleadings and the evidence the case should continue with proof by the defendants, and then we'll thresh out those legal questions finally at that time, so far as this Court is concerned, at any rate. The motions will be denied and we'll adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Wednesday, March 12, 1947, at 10 o'clock a.m.)

Yakima, Washington, Wednesday, March 12, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was [1512] resumed.)

Mr. Holman: Your Honor please, I am associating with me Mr. Raymond Royal, a Seattle lawyer, who will assist me somewhat, and in a couple of days will move admission to the Court.

The Court: Yes, all right. In the meantime he may be associated here and practice in this case.

Mr. Holman: May it please the Court, in regard to the letter filed as Macri's identification 73, I think the last one pertaining to the Glens Falls Indemnity Company, I have checked the matter and I am convinced that I can obtain no process out of this Court that would be effective in San Francisco, where the application is lodged, and I would like to hold the matter in abeyance. In other words, I am satisfied that a subpoena out of this Court would be effective on Mr. Hunter, as having been a witness on the stand, but certainly not the San Francisco people, which would require a deposition, and frankly, the matter of inquiry would be too collateral to ask for a delay for deposition, so that's about the place I find myself in on this identification 73. I would like to offer it in evidence only for the purpose of continuity of the record with respect to the application, your Honor. I don't know whether counsel will object or not. If he does, I'm not going to resist. [1513]

Mr. Olson: I don't feel like consenting to the letter going into evidence, your Honor. It is a letter written by Mr. Hunter to myself, certainly has no materiality in this case. I submitted it to the Court for the Court's information.

Mr. Hawkins: I think the reference to Mr. Holman is probably self-serving.

The Court: Yes. I'll sustain the objection.

Mr. Olson: I would like to withdraw the identification if Mr. Holman will permit.

Mr. Holman: I certainly will, if you will give me the paragraph pertaining to me.

Mr. Olson: Well, I would just as soon leave the original.

Mr. Holman: May I proceed with the defendants' case?

The Court: Yes.

Mr. Holman: I'll call as the first witness Mr. George Staples.

GEORGE STAPLES

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Will you please state your name and your place of residence? [1514]

A. George Staples, Couer d'Alene, Idaho.

Q. And Mr. Staples, in the year 1944 did you become associated with Macri and Company for the purpose of performance of government specification 1062, schedule 1, of the Roza Project?

A. Yes.

Q. Will you please tell me how you became associated? I mean, did you make application, or were you sought out?

A. When I read in the paper that Mr. Macri was low bidder on schedule 1062, I called him in Seattle by 'phone and asked him if he had the personnel lined up for the job. He said no——

(Testimony of George Staples.)

Mr. Olson: I think that the conversation——

Q. That conversation would be hearsay. In other words, you telephoned Mr. Macri?

A. Yes.

Q. And then will you tell me whether or not you went to Seattle to interview Mr. Macri?

A. I did.

Q. And as a result of that interview were you employed? A. I was.

Q. In what capacity?

A. As superintendent.

Q. And tell me whether or not you were given instructions to line out and prepare for job performance? [1515]

Mr. Olson: I think the question is asking for the substance of the conversation, it seems to me.

Q. Well, all right, tell me what your instructions were?

Mr. Olson: The same objection, your Honor. It seems to me that's asking for a conversation.

The Court: Well, I'll overrule the objection.

Witness: My instructions were to inspect the job site and contact the engineer and secure maps and working drawings of the work to be performed on the contract, and to look over the field with a view of selecting a camp-site, and to consider all branches of the work, the various departments, and set up a tentative schedule of work and the equipment that was needed to perform that work, and the manpower that was needed to perform the work. Mr. Macri told me——

(Testimony of George Staples.)

Q. Just a minute, don't take conversation; just go on and give me your instructions.

A. I was instructed to lay out the whole job just as though it were my own job, and set down all of the materials and labor and equipment required for the job, and when I had completed that, to contact Mr. Macri in order to check it over, and if he OK'd it, why then we were ready to proceed.

Q. And in those instructions were there any given with respect to renting equipment or using the Macri equipment? [1516]

A. Yes, I was told to keep an eye out for equipment that was in the locality. Transportation was difficult in that period, and anything that could be secured locally on rental or purchase, we were to secure that way, otherwise it would be shipped in from some other job.

Q. And do you have a record with you, Mr. Staples, did you bring it this morning, with reference to the equipment with which the job was started? Do you have that here, or is it over at the hotel?

A. I don't have it here.

Q. Very well, I'll pass that. Now, what basic document furnished by the government did you use to determine right of way for the purpose of performance of the item of clearing as shown on the specifications?

A. I have the map here.

Q. Is this is?

A. Yes.

Q. May I have this marked for identification, Mr. Clerk? Roughly, will you say what this is, Mr. Staples?

(Testimony of George Staples.)

A. It's a map showing each lateral and sub-lateral separately, to show the pipe line, open trench, structure, and give the government right of way in its several widths.

Q. Now, on that, did you make any additional markings or indications?

A. I believe not. [1517]

Q. And the other you have is what?

A. This is a general lay-out plan of the project, showing roads.

(Whereupon, maps showing laterals and rights of way were marked defendant Macri's Exhibit No. 74 for identification.)

(Whereupon, maps showing location of camp site and roads were marked defendant Macri's Exhibit No. 75 for identification.)

Q. Handing you identification 74 and 75—would you like to look at these, Mr. Olson?

Mr. Olson: I do if you're going to offer them in evidence.

Mr. Holman: I'm going to offer them in evidence, yes.

Q. Each of these blue prints you received from the Bureau of Reclamation, did you, Mr. Staples?

A. Yes.

Q. And any markings which are foreign to the production of the blue prints themselves were placed on by you, or under your direction, correct?

A. Yes.

Q. By the way, while counsel's assistants are

(Testimony of George Staples.)

checking that, will you state into the record your general qualifications, Mr. Staples, please?

A. Well, in construction, after the first World War I was [1518] employed by the Department of the Interior, the General Land Office, at Denver, Colorado, for a survey in Hayden National Forest, Colorado, and La Bonte Canyon in Wyoming. My job was flagman, and I was later promoted to principal assistant, which was third in rank of a party of 25 men divided into two surveying crews, the chief of the party being a cadastral engineer, and the next in line being a surveyor or instrument man, and my work there covered both plane and cadastral surveying.

Q. What is cadastral surveying?

A. Well, plane surveying assumes that the field that you're covering is perfectly level, and you carry your lines out and make your measurements without taking into consideration the earth's curvature; that's principally it.

Q. Well, does it or does it not involve the matter of determination of topography?

A. Pardon?

Q. Does it involve topography, determination of topography? A. Yes, it does.

Q. And in that connection, due reference to sea levels?

A. Yes, elevations and inclinations of hills and mountains are determined with the use of a clinometer, although that type of work is not especially elevation work, although it is covered. [1519]

(Testimony of George Staples.)

Q. Now, will you go on with reference to any subsequent experience you had, particularly with any government projects?

A. Well, in 1937 I entered the subdivision and construction of house building, and set up my own office, which I operated for three years. In developing the subdivision I secured the services of a registered surveyor, whom I assisted in making the survey of the ground to be sub-divided work, by making contour maps, which was all entirely elevation work, showing the different levels and the contours, and carried on this work until defense work started.

Q. That is, on World War II?

A. In World War II, and when defense work started I was employing carpenters at I believe it was \$1.10 an hour, and the scale had risen to about \$1.35 an hour, and my crew went with the government, and I cleaned up my affairs and I went along with them, went to the job at Fort Warren, Wyoming.

Q. Pardon me, where was this subdivision work, in what State? A. In Cheyenne, Wyoming.

Q. All right, sir.

A. And I was employed by the government working on equipment, keeping equipment records in regard to their performance and their break-downs and repairs, and also the hours and [1520] the amount of rental that they drew, and when that job was completed I came to Idaho to look after some property I had had there for a number

(Testimony of George Staples.)

of years, with the idea of building on it, and priorities being out of my reach, I was unable to do anything with it, so I went to work for the Ordnance Depot at Hermiston, Oregon. I was employed there in the equipment department, and assisted the Army Engineers in keeping graphs and statistical data on equipment, equipment operations, and materials, until the latter part of that job, when I was changed over to inspector of general construction.

Q. I'll ask you whether or not in connection with the inspection of general construction you had any occasion to inspect any work that had been done by M. C. Schaefer, doing business as the Concrete Construction Company? A. Yes.

Q. What was it?

A. Concrete Construction Company were subcontractors on the building that I was to inspect, inspectors' work shop. They performed the concrete work.

Q. And you inspected that later, after it was done, did you, sir? A. Yes.

Q. In other words, what I'm interested in, did you have any direct negotiations with the Concrete Construction Company [1521] or did you just inspect the work completed by them?

A. I had no negotiations with them. I was just inspector to the building, and on the building we had concrete inspectors.

Q. Well, will you state, please, whether or not that was the basis for your contact with the Concrete Construction Company whereby you wrote

(Testimony of George Staples.)

this letter which is in evidence as defendant's Exhibit 33? You recall the letter that was introduced here? A. Yes.

Q. I'm referring to the letter of March 2 on Macri Company's stationery, or rather, pardon me, the answer of March 2 on Macri Company stationery, and the letter, that's your signature?

A. Yes.

Q. And the reference on the bottom "P.S. Tell Bill I'm coming to Portland one of these days to get that free feed," to whom does that refer?

A. To William Schaefer.

The Court: May I see the letter, please?

Q. Yes, your Honor. I had that early in the case. Mr. Schaefer identified that, your Honor, and it was admitted, Mr. M. C. Schaefer. Had you become acquainted with Mr. William E. Schaefer on that job? A. Yes, I had. [1522]

Q. Now, with reference to writing the letter and receiving the answer, will you explain to the Court how and why that letter was written by you?

A. At the time that letter was written we had had a number of sub-contractors calling at my house, that was before the camp was set up, I believe——

Q. Where was your house?

A. At 209 South 4th Street, Yakima, inquiring about the possibilities of subbing work on contract 1062. We had applications or inquiries for all phases of the work. It had not been considered from the angle of sub-letting any of the work, and

(Testimony of George Staples.)

the inquiries that came in I referred to Mr. Macri and disregarded them until I had occasion to call on Osberg & Ludberg to make arrangements——

Q. Who were they?

A. General contractors on the main line canal.

Q. On the Roza Project

A. Yes—to make arrangements for our electric light service, electric power service, at our camp site, and in the conversation it came out that they wanted someone to take over the concrete pouring of the lining on the main canal, which amounted to a sizeable yardage. I thought it over a while and thought that probably there would be enough work in there for a concrete outfit to come in and sub those jobs on a pretty nice arrangement to all concerned, [1523] so I wrote the Concrete Construction Company to ask them if they were interested in subbing this contract, the concrete pouring, and also to find out if they would be interested in these other contracts.

Q. Now, in this letter, Exhibit 33, directing your attention to the last paragraph, in which you say “If you’re not interested, would you rent or sell two transit mixers?” what was the basis for that inquiry? A. Well, I had instructions——

Mr. Olson: If your Honor please, I don’t see——

The Court: I think instructions should be admitted only as preliminary. The question is what he did, not what he was instructed. I’ll sustain the objection to that.

Q. What did you do with respect to endeavoring to secure transit mixers?

(Testimony of George Staples.)

A. I inquired around among builders that I came in contact with, to see if we could secure transit mixers, and in writing that letter of March 2 I queried the Concrete Construction Company to see if we could rent or buy transit mixers from them.

Q. What is a transit mixer?

A. Well, it is an agitator, a large drum agitator, mounted on a truck and hooked up in such a way that it mixes the concrete in transit from the batching plant to the point [1524] where it discharges its cargo.

Q. And were transit mixers in use upon other jobs in the Roza district at that time?

A. Yes.

Q. Now, with reference to identifications 74 and 75, will you please explain to the Court how they were used with respect to the right of way, with respect to roads, and with respect to the area for clearing?

A. The location map shows the Macri campsite and the county roads and access roads that lead out of it to the entire project 1062. Where black-top roads came on or near the project they are indicated on the map, and the crayon lines are through roads which would be for good travel, for heavy traffic, to main points in the project.

Mr. Holman: I am going to offer these in evidence, your Honor. In fact I'll offer them now, and if counsel has objection I would like to en-

(Testimony of George Staples.)

tertain it, because I would like the witness to explain the road set-up to your Honor from the map.

The Court: Well, which one are you offering now?

Mr. Holman: Both 74 and 75.

Mr. Olson: I have no objection, your Honor, if it is understood that the matters other than the blue print portion of the map were put on, I assume, by this witness. [1525]

Mr. Holman: Yes, he's already answered that they were.

The Court: Yes, he stated that. Admitted, both 74 and 75.

(Whereupon, defendant Macri's Exhibit No. 74 for identification was admitted in evidence.)

(Whereupon, defendant Macri's Exhibit No. 75 for identification was admitted in evidence.)

Mr. Hawkins: Your Honor, I wonder if that deposition could be published at this time? I'd like to look at it.

The Court: Is that the Philp deposition?

Mr. Holman: The Nelson deposition, and I join in that offer.

The Court: Was the Philp deposition published in this case?

Mr. Holman: No.

The Court: Is there any objection to the Nelson deposition being published?

Mr. Holman: We make application to have the Philp deposition published in this case.

(Testimony of George Staples.)

Mr. Olson: The Macri deposition has been published, has it not?

The Court: No, Mr. Macri is present.

Mr. Olson: Well, I'd like to make application for [1526] the Macri deposition to be published.

The Clerk: The whole deposition, your Honor, came in one envelope, and I have it marked as having published on the 21st of February.

The Court: That is the Philp?

The Clerk: Well, they're all in one.

The Court: Well, they're all opened up and published, then. I'm not just sure as to the extent to which a discovery deposition may be used where the party is present in Court. We can consider that later, if it is shown published here by the Clerk.

Mr. Olson: This Nelson deposition apparently came in this morning, and my copy hasn't arrived yet. I assume it will be here before the day is over.

The Court: How do you propose to handle it? Do you want to read it to the Court?

Mr. Holman: Yes, your Honor. I furnished Mr. Olson my copy, which I have not had a chance to read.

The Court: Do you wish to withdraw this witness?

Mr. Holman: No.

Mr. Hawkins: I asked that it be made available so I could thumb through it.

The Court: Oh, I see. Well, it is published now, so you can go ahead.

(Testimony of George Staples.)

Mr. Olson: I appreciate your offer, but I can't read that deposition and follow the witness' questioning at the same time.

Direct Examination

(Continued)

By Mr. Holman:

Q. Now, Mr. Staples, with reference to Exhibits 75 and 74, will you please explain to the Court what was the outside limit of area within which the work of specification 1062, schedule 1—what was the right of way limit, and show the Court on that, and what you did with respect to clearing?

A. The map shows——

Q. You're talking from 75, now, are you not?

A. Yes.

Q. All right.

A. The map shows the outside boundaries of the project 1062, schedule 1 as well as schedule 2, and the crayon drawings or markings are merely the better through roads that were existing at the time the work was started. It also shows the lateral locations and the main canal.

Q. Well, how wide was your area there for clearing, Mr. Staples?

A. There were two widths of the government right of way. A pipe line trench I believe was ten feet, and open ditch was approximately fifteen feet, but I'm not sure of those dimensions. I am sure that the pipe line trench required less ground than the open ditch. [1528]

(Testimony of George Staples.)

Q. Now, was that clearing done?

A. Yes.

Q. Under your direction?

A. Yes, it was. The clearing was done from this other exhibit.

Q. With reference to 74, then, can you point out or show where the clearing was indicated?

A. The clearing was started from the first lateral to the west, which was 59.3/10. The work commenced with the stilling pool that took off of the main canal and entered structures number 1, 2, and 3, and the clearing equipment and crew proceeded down the lateral and sub-laterals along this right of way, and from there moved over to the next lateral to the east, and continued on until all laterals had been cleared and grubbed, and the rubbish removed and burned; all vegetative matter had been taken out.

Q. Yes, sir; now, there was not a separate unit of clearing, was there, Mr. Staples? In other words, was it a component part of the excavation unit, or not?

A. No, there was a separate crew and separate equipment.

Q. Well, I meant with respect to pay amounts, or do you know or recall?

A. Well, clearing and grubbing was included as a separate item, I believe. [1529]

Q. You haven't checked that, and you don't recall; you're just testifying to memory?

A. No, I'm not sure.

(Testimony of George Staples.)

Q. Now, what was the fact with respect to the general accessibility of the cleared area as a means of travel over the course of the main canal and the laterals?

A. At the commencement of the job county roads had to be relied on for approaches to the different laterals and separate stationing on the laterals. After the work had progressed the clearing crew made accessible roadways down the laterals, so that it was possible to travel over every lateral on the project. This road condition was improved when the open ditch crew pioneered with a dozer and blade, and any place they came to that was inaccessible they were instructed to make accessible an approach to pipe line trenches and to structure locations, so that the crews that were following, for instance, the back hoe, when it got there it had a place mostly built up for it so it could set up and go to work.

Q. You've used the term "dozer." Now, what does that mean in construction?

A. A 'dozer is a tractor.

The Court: A bulldozer, isn't it? Is that what you mean?

A. Yes. [1530]

Q. And a blade is what?

A. A blade is a motor patrol or a street maintainer that has a twelve foot blade in approximately the center or a little forward of center of the wheels, to level off ground or gravel or whatever material that you want, in road construction.

(Testimony of George Staples.)

Q. And what is a hoe?

A. A back hoe is a power shovel that bites into the earth and pulls the earth toward the equipment, toward itself, and then raises and deposits it outside of the area.

Q. Can you tell me whether or not along this cleared area of right of way that you testified about there was available a course for general travel of power equipment operating under its own power?

A. Yes.

Q. And was that used while you were there, continuously for that purpose? A. Yes.

Q. By the way, Mr. Staples, how long were you on this job?

A. From the latter part of February until June 22.

Q. February, 1944? A. 1944.

The Court: Until June 2?

A. 22.

Mr. Holman: At this point, your Honor, I would [1531] like to withdraw this witness. You may cross-examine.

The Court: You wish to withdraw him and then recall him later in the trial?

Mr. Holman: Yes, I do.

The Court: Do you wish to cross-examine, Mr. Olson, as far as he's gone?

Mr. Olson: I suppose when counsel puts him back on, I suppose it will be on a different phase?

Mr. Holman: Yes. This is just identification.

The Court: I think you had better cross-examine now. We can keep it straighter that way.

(Testimony of George Staples.)

Cross-Examination

By Mr. Olson:

Q. You say you were on the job until June 22?

A. Yes, sir.

Q. And on that date you terminated all connection with 1062? A. Yes.

Q. So that you weren't on the job at any time while any concrete pouring was done?

A. No; no pouring while I was there.

Q. Now, you say you were employed by the Department of Interior in the General Land Office? A. Yes.

Q. What kind of work did you do for the Department of Interior? A. Surveying.

Q. Are you an engineer, Mr. Staples? [1532]

A. I am not.

Q. You say you are not. How long ago did you work for the Department of Interior?

A. Right after the first World War; probably it must have been about 1920.

Q. And what specifically did you do with reference to surveying?

A. I started out as a flag man.

Q. What does a flag man do?

A. A flag man goes ahead and flags a point in front of an instrument.

Q. That requires no technical knowledge, does it, Mr. Staples? A. No.

Q. And that's the type of work you did working for the Department of the Interior?

(Testimony of George Staples.)

A. I did that for about two weeks, then I went into various phases of it until I was principal assistant.

Q. Well, just what did you do, Mr. Staples? That's what I want to know; what did you do?

A. As principal assistant?

Q. Yes.

A. Well, for one thing, we would get up in the morning about two or three o'clock whenever we moved to the new camp, and we'd take a shot at Polaris and establish our meridian. [1533]

Q. Do what?

A. Took a shot at Polaris, the north star, and establish our meridian, which had to be done in this case.

Q. Mr. Staples, I'm not asking what "we" did; I want to know what you did, yourself. You started out as a flagman. Now, did you operate instruments yourself, and determine elevation?

A. Not a transit. I operated a clinometer myself.

Q. What kind of machine is that?

A. That's to take sub-grades of hills and mountains.

The Court: It's a little hand level about four inches long, isn't it, Mr. Staples?

A. Yes, except that it has an angle on it, to give the angle, so that when you're triangulating the distance of a point probably a mile away, you run out a base and get the two angles of the base and flag a point ahead and compute the distance,

(Testimony of George Staples.)

without actually surveying it. You take the clinometer and go out and measure your angles and that way you can allow for the curvature, so that you can measure or compute the distance just as though you would run it out in a straight line.

Q. And for what purpose was this being done?

A. Sectionizing on original and re-surveys; part of it had never been surveyed, some of it had.

Q. Well, was it for the purpose of making maps or putting in [1534] roads, or what?

A. Putting in the section lines.

The Court: That's on government land?

A. Yes.

The Court: The Court may have the advantage of counsel, having operated for two years in a government survey.

Q. Well, then, was your work with the General Land Office in the national forest along that same line, then?

A. Yes, that was.

Q. Laying out section lines?

A. Yes.

Q. And after that, then, as I understand, you went into the building business, subdividing land and building homes?

A. Yes.

Q. And after that, that was in 1937 or during that time, you hired an engineer to do your surveying for you, and you worked with him?

A. Yes.

Q. How big of a place was that that you were subdividing?

A. I had a contract on forty acres for the first development, and there was additional land that I never got to on account of the war.

(Testimony of George Staples.)

Q. And you were surveying that for the purpose of subdividing it and giving the lot lines, was that the idea? [1535]

A. Well, in order to have it approved for building and loan, F.H.A. loans, we had to run aerial surveys and make aerial maps, and then run contour maps to show the lay of the land, to submit it to Washington, D. C., for approval as a subdivision, in order to qualify for the 90 per cent loans.

Q. Well, the aerial map is a matter of photography, isn't it? A. Yes.

Q. What you were surveying this for was so that you could plat it out and show the lot lines which you proposed on your subdivision?

A. No, the lot lines were run, but the principal work of laying that out for approval was the securing of the elevations, the different elevations, the contours, to show whether the ground was adaptable for home building.

Q. All right; well, then, apparently, as I understand it, the war started and your crew left you, so you went into the government work?

A. That's right.

Q. And your work there consisted of keeping the equipment records? A. That's right.

Q. That had nothing to do with construction work?

A. It was construction equipment.

Q. Yes, but you were keeping equipment records. Just what [1536] did you do there?

(Testimony of George Staples.)

A. Well, I'd go out on the job and inspect equipment and see if it was operating; if it was down I'd find out why it was down, to try to determine the cause, and keep track of the time it was down, and also keep track of how much work the particular piece of equipment had performed. It was a record of the equipment on the job, just to show operations and show repairs and causes of breakdowns.

Q. In other words, that was mechanical data that you were obtaining and checking?

A. Yes.

Q. Had nothing to do with Bureau of Reclamation work at all?

A. It wasn't the Bureau of Reclamation.

Q. And then after that you became inspector of general construction?

A. No, I was on equipment. I was inspector of general construction for one building. That was the last three months of the job in Hermiston.

Q. Then with the exception of that last three months your work during the defense period was all equipment data and graphs?

A. Up to that time, but not after that.

Q. Well, as I understand it, you only spent three months as a construction inspector, and that was on one building?

A. That's right. [1537]

Q. The building built by the Concrete Construction Company?

A. No, they were sub-contractors handling the concrete work.

(Testimony of George Staples.)

Q. I see, it was a building, then, upon which the Concrete Construction Company sub-contracted concrete work? A. Yes.

Q. And that's the only construction inspection, or superintending inspection, I guess you said it was, that you did during the period that you have related? A. Up until that time.

Q. Well, did you afterwards do some inspection on building and construction work?

A. I did construction work.

Q. Where was that?

A. Well, out at Farragut I was an estimator of construction on all types of buildings.

Q. Where was that? A. Farragut.

Mr. Holman: Where is Farragut?

The Court: On Pend Oreille Lake.

A. Pend Oreille Lake, Idaho, Naval Base.

Q. That again was buildings, was it not?

A. That was all types of construction on that project.

Q. Yes, but the types consisted of building, didn't they?

A. Well, building roads and sewage disposal plants and buildings. [1538]

Q. All right, what was your position?

Mr. Holman: Just a minute, let him finish his answer.

Mr. Olson: I thought he was finished.

Mr. Holman: No, he wasn't.

A. The building project there was identical to setting up a city for 30,000 people, with all its utilities, facilities, dwellings and business operations.

(Testimony of George Staples.)

Q. And what did you do there?

A. I was an estimator.

Q. An estimator for whom?

A. For Walter Butler Company.

Q. For who?

A. Walter Butler Company, a Minneapolis contractor.

Q. What portion of the project did you estimate?

A. The principal work was making quantity surveys of materials.

Q. For what?

A. Well, earth moving, concrete, steel re-inforcing, lumber and brick, concrete block, nails, and all materials that go into general construction.

Q. That was on behalf of a private concern, was it, you say? A. Yes.

Q. Were you the only estimator working for this outfit?

A. No, there were four estimators. [1539]

Q. Well, were you checking other figures, were you, Mr. Staples?

A. No, making original estimates. The department I was in was in the chief engineer's office. The estimates we made were for the purpose of procuring materials, they were not cost estimates.

Q. In other words, your work was entirely with quantities?

A. Principally with quantities.

Q. So that after your company, your employer, had the work to do you would make estimates of

(Testimony of George Staples.)

the quantity of materials required so that they could go out and order it? A. That's right.

Q. Now, you say on this 1062 you tried to get some transit mixers? A. Yes.

Q. And ascertained that none were available, is that right?

A. Well, none were available quick enough for us.

Q. And you had a good many applications, as I understood you to say, for sub-contracting on 1062?

A. Yes.

Q. But you on your own initiative wrote to the Concrete Construction Company, exhibit 33, I believe it was, and asked them if they were interested in this job? A. Yes.

Q. They didn't get in touch with you first, that's correct, [1540] is it not?

A. I believe they called me first, and I referred them to Mr. Macri.

Q. Well, isn't it a fact, Mr. Staples, that the first communication was this letter from you to them, and then they called you back?

A. Well, that could be; I don't remember.

Q. You didn't say anything in your letter about them having called you, did you? A. No.

Q. Your letter is an inquiry to them to see if they're interested? A. That's right.

Q. Now, do you mean to state, Mr. Staples, that you constructed roads up and down these laterals to each of the concrete structure stations?

A. Constructed right of ways, cleared right of ways.

(Testimony of George Staples.)

Q. By that you mean you took the sage-brush off? A. That was part of the operation.

Q. What else did you do?

A. Well, we grubbed the earth and disposed of the material we took out of it. It is a government right of way for the laterals, and it's not a roadway in itself.

Q. Well, I understood you to say, Mr. Staples, that you prepared and constructed roads to every one of these concrete [1541] structure station. Now, did you or didn't you?

A. By the time we had completed the grubbing and the clearing there was access to all points of the laterals on the entire project 1062.

Q. Well, that's where they put the canal, wasn't it; I mean the ditch?

A. That's right, but there was no ditch there.

Q. Yes, but after the ditch was put there, which was done at the same time that these structures were excavated for, you couldn't go down there, could you? A. Yes.

Mr. Hawkins: I object to that. The question is not based on any evidence in the record.

Mr. Holman: I join, your Honor.

The Court: Overruled. It's time for a recess here. Before recessing I just want to refer again to the matter of these depositions. We have a rather unusual situation, because the envelopes were opened and they were published in one case. It runs in my mind, Mr. Olson mentioned Mr. Macri's deposition early in the trial, and I was under the

(Testimony of George Staples.)

impression that since Mr. Macri was present, it probably couldn't be used except on cross-examination or rebuttal. I notice on checking over the deposition rules of the rules of civil procedure, it is rule 26, subdivision D, it provides that upon a trial or [1542] upon other matters any part or all of a deposition so far as admissible under the rules of evidence may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions; then subdivision 2 provides the deposition of a party or or anyone who at the time of the taking of the deposition was an officer or agent, and so forth, may be used by an adverse party for any purpose. Now, I call that to counsel's attention, because it would seem to me that would give Mr. Olson the right to use the deposition or publish it.

Mr. Holman: I have not resisted that. There's been no application in the case in chief.

The Court: Mr. Olson mentioned that, and you said Mr. Macri was present. I was under the impression it would not be proper to use it, since Mr. Macri was here. In view of that situation I'm inclined to entertain a motion by Mr. Olson to use that as part of his case, if he wishes to do that.

Mr. Holman: I'll be very glad; I won't resist that.

The Court: I may have the wrong impression, but my view is that Mr. Olson has the right to use it for any purpose, if he cares to do so. [1543]

(Testimony of George Staples.)

Mr. Olson: I didn't have in mind using it as part of my case, your Honor, but for the purpose of cross-examination.

The Court: It is here; I just wanted to be sure you understood the Court's position.

Mr. Holman: I do intend in due course to use the deposition of Mr. Philp in this case.

The Court: Well, that's a different matter. I think that would be available for use by either party. He isn't here.

Mr. Holman: The only thing I'm not clear about is whether this combination of depositions has been opened in this case, or published in this case. It was published in the five cases that were consolidated. I don't know whether Mr. Olson made the request that they be published in this case. If he did, I would like to join also.

The Clerk: The deposition was originally opened and filed in this case.

The Court: Well, I think the record should show that the depositions of Mr. Philp and Mr. Macri and Mr. Schaefer have been opened and published in this case.

The Clerk: And Joe Macri and Don Macri were also included in those depositions, besides Sam Macri.

The Court: We'll recess, then, for ten minutes.

(Short recess.) [1544]

(Testimony of George Staples.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Staples, we were just talking about the roads. It is a fact that the roads, or the roadway that you referred to, was the cleared right of way for the laterals on 1062?

A. At that time it was.

Q. Well, yes, that's the only clearing that you made, wasn't it, was for the right of way for the lateral ditch and pipe line?

A. At that time that was all that was made, yes.

Q. And were you there when the ditch was put down, the lateral was excavated?

A. Quite a lot of it.

Q. That was sub-contract, was it not, to Morrison?
A. No.

Mr. Holman: May it please the Court, I think the witness should have a chance to finish his answer.

The Court: Yes, let him finish. Had you finished your answer?

A. Yes, sir. That work was not sub-contracted at the start. I supervised the pipe trench and the open trench digging for at least the first two laterals.

(Testimony of George Staples.)

Q. And that first two laterals, the open trench digging that [1545] you did, was done right down this cleared right of way, wasn't it? A. Yes.

Q. Then it wasn't any longer a road, was it?

A. Yes.

Q. Still was. How deep was the ditch that you dug?

A. Varied all the way from one and five tenths up to three feet.

Q. In depth? A. Yes.

Q. And the right of way that you cleared was how wide?

A. I'd have to refer to the map to see definitely what the width is; it varied.

Q. Well, you indicated, I believe, that it was from ten feet to fifteen feet in width?

A. That's approximately what it is.

Q. And this ditch went right down the center of it?

A. Yes, where the ditch line ran; part of it was pipe trench and part ditch.

Q. How wide was this ditch you dug?

A. At about a 24 inch base. I don't remember the width from brim to brim. It would probably be three feet, four feet.

Q. And then the dirt was piled up, I suppose, alongside? A. It was banked on either side.

Q. Pardon? [1546]

A. It was banked on either side.

Q. Now, did Morrison-Knudson go to work while you were still on the job?

A. They never went to work.

(Testimony of George Staples.)

Q. Or Morrison, I mean? A. Yes.

Q. They went to work while you were still on the job? A. Yes.

Q. So that they were excavating for the pipe trench and for the open ditch prior to June 22, 1944?

A. They excavated for open ditch. They never dug pipe trench. We handled that all the way through the job. They did, prior to June 22.

Q. Did you build any other roads other than this right of way that you cleared for your canal, your laterals?

A. Yes. When the grubbing crew had finished, we had access, we had a roadway, to every part of every lateral. When the pioneering was done for the open ditch the movement of that equipment over there made us additional roads, and in places where the equipment had to travel only on the right of way, and there was a hill or a place where we couldn't get through with our trucks, why, they knocked it out, just punched it out so that it was accessible and you could travel right along each lateral beside the open ditch. [1547]

Q. Now, Mr. Staples, isn't it a fact that you refused throughout the time you were there to make any roads available for the Concrete Construction Company? A. No.

Mr. Holman: Just one minute. Your Honor, I object to that as improper cross-examination.

The Court: He testified about building roads here, didn't he?

(Testimony of George Staples.)

Mr. Holman: Yes, but now counsel asked him if he refused to build roads for the Concrete Construction Company.

The Court: Overruled.

Mr. Holman: Well, he hasn't answered that question.

The Court: Yes he did. He said "No."

Cross-Examination

(Continued)

By Mr. Olson:

Q. Isn't it a fact, Mr. Staples, that you told the Concrete Construction Company that you had no responsibility as far as making roads was concerned? A. The road question came——

Q. I'm asking you, didn't you tell them that, that the roads were no affair of yours or of Macri Company?

A. Well, I don't remember that.

Redirect Examination

By Mr. Holman:

Q. Well, what did you tell them? You started to give an [1548] answer.

A. Not having any request to make a road, I don't recall anything about roads coming up. I never had a request made to me to give a road. Now, whether or not I would have made the road, right now I don't remember whether it was my responsibility or whether it wasn't.

(Testimony of George Staples.)

Mr. Holman: Pardon me, did you have any questions?

Mr. Hawkins: I have no questions.

Mr. Ivy: No questions.

Redirect Examination

(Continued)

By Mr. Holman:

Q. Counsel asked you about Morrison and Knudson, and then you changed and said Morrison. Was that H. H. Morrison Company?

A. It was James Morrison.

Q. James Morrison; and what was their operation? I believe you said they excavated for the open ditch, and did what else, do you remember?

A. They dug the open ditch. I believe that was all.

Mr. Holman: Thank you. That's all, Mr. Staples.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: Your Honor, I would like to make application at this time to read the deposition of Mr. Nelson as next in order of our proof.

Mr. Olson: If you Honor please, I would very [1549] much prefer that it wait until I get my copy of the deposition. I called my office again during the recess and it is still not there. I don't understand why counsel has his copy and the original is here, and my copy isn't, but it's a little hard to follow.

Mr. Holman: Counsel understands as well as I do both counsel ordered it. I presume the reason was that the bill was in mine. I am glad to have counsel use my copy.

The Court: Well, will it inconvenience you very much to wait? I think counsel should have an opportunity to look over his copy.

Mr. Olson: Mine should be here during the day, I assume.

Mr. Holman: The reporter just happens to be a stranger to both Mr. Olson and me.

Mr. Olson: No, I'm not indicating anything out of the way, except I haven't got it, that's all.

Mr. Holman: I would like at this time, your Honor, to read, just for the purpose of progressing, I would like to read into the record the deposition of Mr Philp.

The Court: Yes, all right.

Mr. Hawkins: I understand that this is being read as part of defendant Macri's case, and of course not part [1550] of the plaintiff's case. It was never read into the record as part of plaintiff's case at all.

Mr. Holman: That's right, sir. This is read for the purpose of the cross-complaint features of Macri against Goerig and Philp; and would you kindly cooperate with me by reading either the questions or the answers?

Mr. Hawkins: Is that necessary? I'll be glad to do that.

Mr. Holman: I will appreciate it.

(Whereupon, counsel read the deposition of Clyde Philp as follows:)

“CLYDE PHILP,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Holman:

“Q. Will you give your name, please?

“A. Clyde Philp.

“Q. You live where, Mr. Philp?

“A. At 2933—Second Avenue, Seattle, Washington.

“Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

“A. Yes.

“Q. So you waive that, do you? [1551]

“A. Yes.

“Q. In the record?

“A. Yes.

“Q. What is your relationship,—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earth work, pipe line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and

(Deposition of Clyde Philp.)

specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r-14825 for earth work, pipe lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, with specifications No. 1602, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp?

“A. I believe it is.

“Q. All right, what is your answer?

“A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944. [1552]

“Mr. Holman: Counsel Brown, I call for the production of that.

“Mr. Brown: I haven't the original of that.

“Mr. Holman: All right. Maybe I can identify it.

“Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

“Mr. Brown: Here it is.

“Mr. Holman: You have a copy?

“Mr. Brown: Yes.

(Deposition of Clyde Philp.)

“Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

“Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred?

“A. That’s right.

“Mr. Holman: Will you mark it for identification, please? (So marked.)

“Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.” [1553]

Mr. Holman: I think in view of the fact that there are exhibits in evidence now definitely tying both joint venture agreements, and counsel will admit that that is the termination of the agreement, which is also in evidence, I’ll not ask for the production of that particular copy.

Mr. Hawkins: The termination agreement and the two joint venture agreements are in evidence. Mr. Philp in referring to July, 1944, evidently is referring to the termination agreement, as that is the only agreement in July, 1944.

Mr. Holman: That is my understanding.

(Whereupon, counsel continued to read the deposition of Clyde Philp, as follows:)

“Q. (By Mr. Holman): Mr. Philp, I hand you defendant’s and Cross-Complainants’ Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5,

(Deposition of Clyde Philp.)

inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

"A. That's right.

"Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & [1554] Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earth work, pipe lines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

"A. There is mention made of those two in the agreement of July 15, 1944.

"Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

"A. That's right.

"Q. Is there any other written agreement or any other writing in any manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification?

"A. Not to my knowledge.

(Deposition of Clyde Philp.)

“Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

“Mr. Brown: Any such——?

“Mr. Holman: Other than this. [1555]

“Mr. Brown: As far as I know there is nothing else in writing.

“Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants’ Identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

“A. I believe that is right.

“Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goerig, at the time of the execution of the instruments I have previously indicated to you in December, 1943?

“A. We were partners on some jobs——

“Q. I am speaking with respect to these jobs.

“A. We each had an individual interest in this job.

“Q. As indicated by those——

“A. As indicated by the joint venture agreement signed December 11, 1943.

“Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

“A. I would not know until there is a full accounting on the Stadium Home Project.

(Deposition of Clyde Philp.)

“Q. It is a fact, is it not, that with respect to the Stadium [1556] Home Project there was an additional joint venture agreement?

“A. That’s right.

“Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third?

“A. That’s right.

“Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated?

“A. That is correct.

“Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

“A. A 1942 G.M.C. pick-up truck.

“Q. Will you indicate in respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

“A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

“Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

“Mr. Brown: I have no record. [1557]

“Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly

(Deposition of Clyde Philp.)

verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

“The Witness: Well, off the record.

“(Discussion off the record.)

“Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

“Mr. Brown: Yes, I will do that.”

Mr. Holman: And may I ask for the production of that, if you have it?

Mr. Hawkins: I do not have it.

Mr. Holman: Will you prepare it?

Mr. Hawkins: I cannot prepare it. I do not have the information.

Mr. Holman: Before proceeding, may I understand that Mr. Brown, your associate, and you, have done your best to comply, and have not been able to furnish that information?

Mr. Hawkins: Well, I haven't done anything about securing that information. Mr. Brown advised me that he asked Mr. Philp to secure it if he could, and nothing further has been done. [1558]

(Whereupon, counsel continued to read the deposition of Clyde Philp, as follows:)

“Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

“A. Not without referring to the records.

“Q. Nor the time it was there?

“A. Not at this time.

(Deposition of Clyde Philp.)

“Q. And does that include the naked truck or the truck and driver?

“A. It includes the truck only.

“Q. And was that before or after O.P.A. maximum rental regulations, do you remember?

“A. It was after the O.P.A. regulations.

“Q. Can you tell me whether or not that conformed to those regulations, if you know?

“A. They naturally would.

“Q. You think they did, is that right?

“A. I believe they did.

“Q. That is the only item, Mr. Philp?

“A. To the best of my knowledge.

“Q. No materials furnished of any kind?

“A. None that I know of.

“Mr. Holman: I return the witness to you, Mr. Brown.

“Mr. Brown: I have no questions. [1559]

“Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions.”

Mr. Holman: That was addressed to Mr. Olson, who was there.

Mr. Hawkins: I might state, your Honor, with reference to that demand made by counsel, there's been no subpoena duces tecum issued by the Clerk to Clyde Philp or to Mr. Goerig, nor has any formal demand been made upon us, nor has any oral demand been made on us up to this time.

Mr. Holman: Since this taking.

Mr. Hawkins: Since this taking.

Mr. Holman: That's correct, your Honor. Your Honor, under the rule as indicated this morning, which upon my calling the same matter to the Court previously was, as I remember, ruled against me, I would like now to read from line 1 on page 13 with respect to Mr. Goerig the following:

Mr. Hawkins: With respect to whom?

Mr. Holman: Mr. Goerig.

The Court: Is this now from Mr. Goerig's deposition?

Mr. Holman: No, this is an admission into the record. [1560]

Mr. Hawkins: Well, I object to that, your Honor. It is not the testimony of Mr. Philp, it is not the testimony of Mr. Goerig, Mr. Goerig is here in Court to testify.

The Court: I can't tell just what you're asking without looking at it.

Mr. Holman: I would like to present to the Court line 1 to line 20, page 13, which would indicate my position, consistent with your Honor's ruling today.

The Court: That's line 1 to 5 there, at the top of the page, is it?

Mr. Holman: I thought it ran to line 20.

The Court: Well, yes, the rest of the page.

Mr. Hawkins: My point is, your Honor, that that isn't the deposition of anybody, and therefore not within the rule.

The Court: It isn't a deposition, but it may be read into the record as a stipulation for what it is worth.

Mr. Hawkins: I understood counsel was offering it under the rule your Honor read, and I don't think it is within that rule. If counsel wants to introduce it as evidence of a stipulation——

The Court: I don't believe it is a deposition; I think it is a stipulation. [1561]

Mr. Holman: I'll read it, your Honor.

(Whereupon, counsel read from page 13 of the deposition of Clyde Philp as follows:)

“Mr. Holman: Mr. Brown, as Counsel for the defendant and Cross-Complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp,—if Mr. Goerig were here?

“Mr. Brown: Yes.

“Mr. Holman: That is all.”

Mr. Holman: I would like to call Mr. Macri, your Honor, with the purpose in mind of withdrawing him to read the Nelson deposition after lunch.

The Court: Yes, all right. I might ask, Mr. Olson, your purpose in requesting that we wait until your copy comes before reading this Nelson deposition, was that to enable you to examine the copy, or just to have something to follow while it is being read here in Court?

Mr. Olson: Well, I wish to go over it with the thought in mind of being prepared to make objections.

The Court: I see. Well, I think then we should wait, if necessary, the rest of the day.

Mr. Olson: I directed my office to bring it down here to me as soon as it arrives. There should be two [1562] more mail deliveries today.

The Court: Well, you wouldn't have much time to examine it here unless it was during recess.

Mr. Olson: Not unless I get it before noon, that's right, your Honor.

SAM MACRI

one of the defendants, recalled as a witness on behalf of the defendants Macri, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Macri, you are S. M. Macri, or Sam Macri, Sr.? A. Yes.

Q. A member of the co-partnership of Macri and Company? A. Yes.

Q. That being composed of yourself, your brother Joe Macri, and your son Don Macri, correct? A. Yes, sir.

Q. Mr. Macri, will you please tell the Court your personal experience as a general contractor, what have you been doing, and for how long, and what nature of work, and will you kindly talk loud enough and slow enough so that the reporter will get your answers?

A. Well, I've been in the general construction around 26 years, general construction and different type building work, sewer work.

(Testimony of Sam Macri.)

Q. Could you give us some more about it? Get the volume up. [1563]

A. Bridges, highways, disposal plants, and also did several of those defense project work.

Q. Where was that defense work, Mr. Macri?

A. Oh, we built quite a few in Bremerton, about three thousand, was a defense project in Bremerton.

Q. Was that a housing project? A. Yes.

Q. Now, did you have any project at Fort Lewis?

A. Yes.

Q. What was that?

A. Well, that was a complete system, sewer and water main, and included man-holes and catch basins and some reservoirs.

Q. Could you get some more volume there?

A. Well, that was a complete system in Fort Lewis, which was sewer main, water main, catch basin, man-holes, and some reservoirs.

Q. Now, during that period has your time been devoted principally to public works improvements? I mean by that works for the cities and subdivisions and the Federal government, or has your work been for private persons principally?

A. No, we been out on jobs.

Q. That answer I think wasn't responsive. What I wanted to know was whether or not you had worked principally during [1564] that period for public bodies as against working principally for individuals, persons; do you know what I mean?

A. You mean competitive bid?

(Testimony of Sam Macri.)

Q. No, no.

Mr. Olson: Just ask him what he did.

Q. Well, all right, counsel. I want to know, Mr. Macri, if during your twenty-six years' experience you had a major portion or a considerable portion of your experience with either the United States Government or the State of Washington or the counties or the cities or other municipal subdivisions?

A. Well, we did the work for cities, state, and the government, building jobs.

Q. Well, did you also work for private parties, too? A. No, we never did private works.

Q. That's what I want to find out. I don't know whether you mentioned the installation, had you done any installation of water mains? Had you installed water mains? A. Yes.

Q. Had you built bridges?

A. Beg your pardon?

Q. Had you in your experience built bridges?

A. Yes, we built quite a few bridges.

Q. What kind of bridges? [1565]

A. I built for the State Highway, Washington, we built quite a few bridges, and also we built the one across the Lake Union in Seattle, about three miles long.

Q. Across Lake Union? A. Yes.

Q. And where is that bridge, Mr. Macri? What is that bridge?

A. Oh, they call it Ballard Bridge, over in Seattle.

(Testimony of Sam Macri.)

Q. Ballard Bridge, across Lake Union, you constructed? A. Yes.

Q. And will you tell me whether or not your experience has been limited principally to that of a principal operator, or subbing the work from others?

A. Oh, mostly principal. We never sub much.

Q. And will you tell me whether or not principally you have performed the work yourself, or have let it out to sub-contractors?

A. We did the most ourselves, only some of those defense projects we subbed electrical work and plaster and things like that, but the main point we did ourselves.

Q. The main contract you have performed yourself? A. Yes.

Q. Now, what experience, if any, in your construction life had you had with respect to the Roza Project before bidding on specification 1062?

A. Well, I did just one job over there before, some syphon [1566] and ditching.

Q. What was that, please?

A. I did some work on the Roza Project before I did this work here. It consisted of concrete work and re-inforced steel; it was a big syphon, five syphons.

Q. Syphons? A. Yes.

Q. And when was that, about? Do you remember how long ago that was?

A. I'm not sure, but I think it was around 1940.

Q. About 1940?

A. Yes; I don't know just exactly.

(Testimony of Sam Macri.)

Q. Now, prior to 1940 had you made inspection of the various projects advertised for bids, and bid on them, or not?

A. Oh, I been bidding right along here.

Q. How long had you yourself been acquainted with the Roza Project as a continuing construction project?

A. Oh, I been a bidder, oh, I'd say since the last ten years, I been making bids, I'd say mostly every one, and I never was allowed to get any until this syphon.

Q. Will you tell me whether or not your syphon job was completed and accepted by the government?

A. Yes, it was.

Q. And paid for? A. Yes, sir. [1567]

Q. Tell me, please, whether or not in advance of making a bid for specification 1062, schedule 1, you came over here and went into the field with any of the government representatives?

A. 1062?

Q. Yes, sir? A. Yes.

Q. With whom, and when?

A. Mr. Nelson took me over there.

Q. For the purpose of the record, would that be Harold T. Nelson or H. T. Nelson, the engineer in charge? A. H. T. Nelson, yes, sir.

Q. Now, when, about, Mr. Macri, with respect to your bid, did you go into the field with Mr. Nelson?

A. Well, I went into the field with Mr. Nelson before I bid the job, just to show me the location.

(Testimony of Sam Macri.)

Q. At that time were there any of the government stakes in to locate the excavation quantities that were to be removed? Had it been staked then, or not?

A. No, there was no stakes then; they just showed the location.

Q. And did you bid upon the whole of specification 1062, both schedules 1 and 2, or just on one?

A. I bid on both.

Q. And you were the successful bidder on which?

A. On 1062, schedule 1.

Q. And not on 1062, schedule 2? A. No.

Q. At the time that you came into the field can you tell me whether or not there was work being done on an adjoining job to the location of 1062, schedules 1 and 2? A. Oh, yes, there was.

Q. I'm directing your attention particularly to the work of the Murphy-Campbell Company. Was that in progress? A. Yes.

Q. Tell the Court in a general way what they were doing, if you recall?

Mr. Olson: That's objected to as being wholly immaterial, what another contractor was doing on an adjoining job.

Mr. Holman: I'm not going into detail. It is the types of excavations, types of work going on, is all.

The Court: What is the purpose of it?

Mr. Holman: To show his familiarity with the project.

The Court: Well, I'll overrule it.

(Testimony of Sam Macri.)

Q. Did you understand my question? What was the general type of work Murphy-Campbell were doing?

A. It was the same type as 1062; there was ditching and the structures and the open canal. [1569]

Q. And directing your attention to Osberg and Ludberg, can you tell me whether or not they were working at the time you were over there with Mr. Nelson?

A. Yes, they were working.

Q. What were they doing, do you remember?

A. Well, they're working the main canal, the big canal.

Q. And can you tell me whether or not Sather and Son were working at that time?

A. Yes.

Q. What was the nature of their work?

A. Their work was a diversion canal, they call them, a small canal with a concrete lining and structure; they catch some of the water there, what they call a spillway, down somewhere else.

Q. Can you tell me whether or not at that time while on that work and from your previous experience you had had occasion to see the respective types of equipment that were adaptable and being used?

A. Oh, yes, I couldn't help but see that.

Q. Can you tell me what type of equipment Murphy-Campbell were using for digging structures at that time?

A. Well, they had a half yard hoe.

Q. And when you say a half yard hoe, is that the type of equipment Mr. Staples just defined here?

A. Yes, a power shovel and a hoist. [1570]

No. 11707

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

Transcript of Record
In Five Volumes
VOLUME IV
Pages 1429 to 1908

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

No.11707

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(Testimony of Sam Macri.)

Q. And what type or types of equipment, if you remember, were Osberg and Ludberg using at that time?

A. Well, they had several pieces of equipment. It was on the big canal. They had a big drag-line for digging dirt, and they had a shovel, and some trucks.

Q. Mr. Macri, did you make your own estimate for bidding 1062, schedule 1, or was it made for you?

A. No, I make my own bid.

Q. Do you have with you the estimate that you made at that time? Did you bring it here to Court?

A. No.

Q. Is it over at the hotel, or do you have it? Do you have a copy of the estimate that you made at that time, Mr. Macri?

A. You mean the pencil copy?

Q. I mean the actual estimate, what comprised the component parts of the estimate. Do you have that over here, the work sheets? Do you have them, or not?

A. Well, I don't recall; I can't say, unless it's in my brief case.

Q. Will you during the noon hour try to find that?

A. Yes. I wouldn't say if I got that or not.

Q. During the noon hour will you try to find that out?

A. I'll be glad to.

Mr. Holman: I would like to pause at that point.

The Court: We'll recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Wednesday, March 12, 1947
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, counsel advises me he has not yet received his copy of Mr. Nelson's deposition, and while I would prefer to read that at this time, in orderly proof, I would like to accommodate counsel, and I shall hold that for the time being, at least, and I understand, Mr. Olson, if it does come it will be brought over here?

Mr. Olson: Yes, I left instructions at the office that it be brought over immediately.

SAM MACRI

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, did you try during the noon hour to locate any original figures you made on the estimate, you yourself made?

A. Yes, I looked, but I haven't got them.

Q. You haven't them over at the hotel? [1572]

A. No.

Q. Can you tell me from memory whether or not in your preparation of the various units which made up your bid, you made an estimate of the quantity of lumber you determined as reasonably a maximum

(Testimony of Sam Macri.)

for performance of the item 12, concrete construction, as shown by plaintiff's Exhibit 3, and I'll show you what I mean here, from the exhibit, referring to item 12 of plaintiff's Exhibit 3, concrete structures, estimated 1515 cubic yards; now, what I'm asking you is whether or not in your estimate you determined the maximum quantity of lumber that you used to arrive at your bid amount?

Mr. Olson: Now just a minute. We object to that, your Honor, as being immaterial and irrelevant, what figure Mr. Macri took into consideration and what he figured in his estimate as to the amount of quantity that would be used.

Mr. Holman: Your Honor, I would like to requalify the question a little before your Honor rules on that.

The Court: All right.

Q. Mr. Macri, have you had previous opportunities to estimate jobs, including the use of lumber in connection with concrete? A. Yes. [1573]

Q. And has that experience been over a considerable time, or a limited time?

A. Time to time.

Q. Time to time, yes. Well, did you estimate a maximum quantity of lumber to become a component part of the performance of this item 12?

A. Yes, I did.

Q. And will you tell me whether or not you remember that? Don't say what it is. Tell me whether you do remember it or not.

A. Yes, I remember it.

(Testimony of Sam Macri.)

Mr. Holman: Now, I submit, your Honor, that the question previously asked is sufficiently qualified.

The Court: Is the purpose of this to show what in his opinion as an expert construction man and contractor was reasonably necessary to do the work here?

Mr. Holman: Yes, as a maximum of lumber, yes.

The Court: I don't know; I suppose what he estimated would be necessarily assumed as his opinion of what was necessary. Is that the purpose for which it is offered?

Mr. Holman: Yes.

Mr. Olson: That's the basis of my objection. He hasn't asked him that. He's asked him what figure he used in his estimate. [1574]

The Court: It seems to me the amount he furnished would be material, rather than the estimate, unless the estimate was put in as his opinion of what was required, as an expert.

Mr. Holman: I'll ask you, Mr. Holman—I don't believe I care to qualify Mr. Macri as an expert, your Honor, as he is principal defendant. I doubt if I wish to do that.

The Court: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. And in making your bid for item 12, concrete structure, did you keep in mind that quantity of

(Testimony of Sam Macri.)

lumber that would be required, in your opinion, for the performance of the job? A. I did.

Q. Now, Mr. Macri, with reference to the units bid as shown by schedule 1 in Exhibit 3, I'll ask you if you could very briefly indicate to the Court those units you bid upon which were correlated or part of the plan of the structure excavation and concrete structures; just call the numbers.

A. Well, number 1, that's excavation, common.

Q. Was that involved? A. No.

Q. Well, you mis-understood my question, Mr. Macri. I want [1575] you to indicate to the Court those that were involved in the performance of the concrete structure, as to the units.

A. That's item 7, is what is involved in the concrete structures.

Q. What is that item?

A. That's excavation common for structures.

Q. Now, how many cubic yards of excavation of common for structures were in the preliminary estimate as shown by that?

Mr. Olson: Your Honor, the preliminary estimate speaks for itself on that, I think.

Mr. Holman: Well, it does, your Honor, and I can read it into the record.

The Court: It is in evidence.

Q. Well, was that the quantity of excavation you figured upon? A. Yes.

Q. And your bid was for how much?

A. 50 cents a cubic yard.

Q. And how many yards did you figure upon there?

(Testimony of Sam Macri.)

Mr. Olson: The same objection, your Honor. It doesn't have any bearing what Mr. Macri figured on.

Mr. Holman: Well, these are his bids, your Honor.

The Court: I don't see the materiality of it.

Mr. Holman: I'm merely directing your Honor's attention to the particular units, and I can do it without the witness, your Honor.

The Court: Well, why not do it that way?

Mr. Holman: Very well. I'm calling your Honor's attention at this time to exhibit 3 as the items involved in connection with item 12: Item 7, excavation common for structures, estimated 8250 cubic yards, and a bid price of 50 cents per cubic yard, or a total amount of that unit bid, \$4,125.00; item 8, excavation, rock, for structures, 200 estimated cubic yards, a bid price of \$3.00 per cubic yard, or \$600.00; item 9, back-fill about structures, 8650 cubic yards at 25 cents per cubic yard, or an estimated amount total of \$2,162.50; item 10, puddling or tamping back-fill about structures, 3300 estimated cubic yards, a bid price of 40 cents, or \$1,320.00, was the amount of that unit bid; item 12, concrete in structures, 1515 cubic yards at \$35.00 per cubic yard, or a total for that item of \$53,025.00; item 13, placing re-inforcement bars, 12,700 estimated pounds at 3 cents per pound, \$381.00; item 15, erecting timber in structures, estimated 10,000 feet board measure, at \$45.00 per thousand board feet measure, or \$450.00; item 16, installing gates and miscellaneous metal work, 13,000 pounds at 5

(Testimony of Sam Macri.)

cents a pound, or \$650.00 for that unit; and the other items relate to other operations. [1577]

The Court: Yes, all right.

Mr. Holman: And similarly, your Honor, without detailing the units, other than calling the number, since the bid prices are mentioned here in exhibit 4, plaintiff's exhibit 4, I would direct your Honor's attention to item 7, item 8, item 9, item 10, item 12, item 13, item 15, and item 16.

The Court: That's on 1068?

Mr. Holman: Yes, your Honor, and parenthetically, in my opening statement, I forgot about those incidental items as covered by the Concrete Construction Company contract.

Direct Examination
(Continued)

By Mr. Holman:

Q. I will ask you whether or not in advance of making your bid for specification 1062, schedule 1, you had any conversation with Mr. H. T. Nelson, the engineer of the Bureau, with respect to requirement of slopes? Just tell me yes or no, that's all; did you? A. No.

Q. Sir? A. No.

Q. You did not. And did you have any conversation with Mr. Nelson with respect to the pay limits for excavation? A. Yes.

Q. All right, don't say what it was. Now, will you tell me [1578] whether or not in advance of

(Testimony of Sam Macri.)

signing the contract in evidence, the sub-contract in evidence between Mr. Schaefer and yourself, you communicated to Mr. Schaefer what you had talked with Mr. Nelson? Did you, or did you not, about that? Do you know what I'm asking about, Mr. Macri? A. The slope?

Q. Yes; did you talk with him about the excavation, the pay limits? Did you talk to Mr. M. C. Schaefer about that before the sub-contract was signed?

A. No, we never talked about the slope.

Q. You did not talk to Mr. Schaefer about that. Did you talk to him about any of the pay quantities?

A. Not with Mr. Schaefer.

Q. Well, that's what I'm talking about, in advance of signing the sub-contract. All right, sir. When did you first contact Mr. Schaefer or Mr. Schaefer contact you? When was the first time you had any communication between you and Mr. Schaefer, Mr. M. C. Schaefer, I'm talking about, unless I indicate otherwise.

A. Well, it was during the first part of March.

Q. How was the contact made? What was it, Mr. Macri?

A. I think Mr. Schaefer called me up to make an appointment with me in Seattle.

Q. He called you from where, do you know?

A. I think it was from Portland, if I remember right.

Q. Yes, sir; and was an appointment made?

A. Yes.

(Testimony of Sam Macri.)

Q. In that conversation with Mr. Schaefer do you remember the substance of what was said, or not?

A. He say he received a letter from Mr. Staples, my superintendent, and was reported that he'd be interested in subbing some of that concrete in Yakima, and I told him that's all right with me, if he would be interested, and I remember he tell me it would be a day or two before he would come to see me in Seattle, and I told him that would be all right with me.

Q. Now, then, did Mr. Schaefer later come to see you in Seattle? A. Yes, he did.

Q. Where?

A. That was in the office, 905 10th South, Mr. Schaefer come over.

Q. That's 905 10th South?

A. Yes, that's where my office is.

Q. That's in Seattle? A. Yes.

Q. And did you have a talk with Mr. Schaefer at that time?

A. Yes, he come over and introduce himself, and also his brother was with him. [1580]

Q. When you say his brother, that is Mr. W. E. Schaefer, that's here? A. Yes.

Q. And do you remember what the substance of that conversation was, so you could tell the Court, or not; do you remember?

A. Yes. He say——

Q. When you say "he," you're speaking of M. C. Schaefer?

(Testimony of Sam Macri.)

A. M. C. did the talking. Of course he say he was from Concrete Construction, and he said he'd be much interested in subbing the concrete, and I told him that's all right with me, if he want to give a figure.

Q. Did he say whether or not prior to that he had been on the job at Sunnyside, do you remember?

A. Yes, I think he told me he come through Yakima and look the job over.

Mr. Olson: If the Court please, I think counsel should just ask this witness what the conversation was, and not try to suggest each thing to him.

Mr. Holman: I think I've fallen into counsel's error.

The Court: It is rather leading.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give the substance of the conversation, the best you can remember, Mr. Macri, that conversation? [1581]

A. Yes, Mr. Schaefer say he went through Yakima and look the job over, and he'd be much interested in subbing on that concrete. I told him it would be all right with me, if he give a figure, and we agree, why, it's O.K., so I had a set of plans and specifications in the office, and I told him if he want to look them over, and he said yes, I would like to take this to Portland with me and come back and give you a figure.

(Testimony of Sam Macri.)

Q. Now, just a moment; when you say plans and specifications, I'll ask you whether you are referring to the plans and specifications covered by Exhibit 3? A. 1062, yes.

Q. All right. Did you furnish him with the plans and specifications?

A. Yes, sir, I did; he took them along with him in Portland.

Q. At that time did you have any of the lay-out drawings? A. No.

Q. Had the government at that time furnished you with lay-out drawings?

A. No, not then.

Q. And was there any other data or maps or information referred to at the time, do you recall?

A. No, the government they furnish us after we get to starting, they furnish us with large detail.

Q. When you started work? [1582]

A. Yes.

Q. Well, was there any price or figure quoted or suggested by you at the time of this first meeting with Mr. Schaefer in your office?

Mr. Olson: The same objection, your Honor.

(Whereupon, the reporter read the last previous question.)

Q. In other words, Mr. Macri, what I want to know is whether or not you specified any price to Mr. Schaefer at that time?

A. Oh, no, I never specified any price.

Q. I see; and in that conversation with Mr. Schaefer can you tell me whether or not the pro-

(Testimony of Sam Macri.)

posed proposal of sub-contracting the work was limited to any particular item or items?

Mr. Olson: That, your Honor, is objected to. If this witness wants to detail the conversation, and then let your Honor determine whether or not it was limited to anything, or what the effect of it was——

Mr. Holman: I think counsel's objection is well taken, your Honor.

The Court: I'll sustain the objection.

Mr. Holman: I'll withdraw the question.

Direct Examination

(Continued)

By Mr. Holman:

Q. Can you, as far as you possibly can remember, Mr. Macri, [1583] will you tell all of the conversation that occurred between you and Mr. M. C. Schaefer or Mr. William E. Schaefer at that time in your office, before he took these specifications and left?

A. Well, we was talking about he was interested in giving a figure on the concrete and form work, and told me he wanted to take those plans and specifications in Portland with him, so he can come back and give a figure.

Q. Now, then, you say he came back later and gave you a figure?

A. Yes, he came back and gave me a figure.

Q. The same day, or a different day, or what?

A. Oh, no, it was two or three days afterwards.

(Testimony of Sam Macri.)

Q. And when he came back do you recall where that meeting was? A. It was in the office.

Q. In your office? A. Yes.

Q. At this same address? A. Yes.

Q. And at that time was there any contract signed? A. No.

Q. You say Mr. Schaefer at that time gave you a figure, is that what you said? A. Yes.

Q. What do you recall was the figure that Mr. Schaefer gave you at that time?

A. Yes; first he give a figure of——

Mr. Olson: Your Honor, I don't see what materiality that has. We have a signed contract where the figure was ultimately made, and the price was fixed, unless I misunderstand the purpose.

Mr. Holman: I have in mind just this, your Honor. The signed contract has very evidently upon its face some alterations and some additions, and I'm merely trying to get that picture, have a clear explanation to your Honor of how that contract is that way.

The Court: Well, I'll overrule the objection.

Mr. Holman: Will you read the question?

(Whereupon, the reporter read the last previous question.)

A. Well, first he say he wanted \$30.00 a yard.

Q. How much? A. \$30.00 a yard.

Q. I'm sorry, I haven't yet heard you.

A. \$30.00.

Q. \$30.00? A. Yes.

Q. All right.

(Testimony of Sam Macri.)

A. For complete, everything, form lumber and everything, and [1585] I asked him "Why you want so much for it?"; well, he say, "you know, I got to pay for lumber about \$60.00 a thousand, and lumber cost me so much more, so that's the reason for it."

Q. Now, did you have any conversation with Mr. Schaefer with respect to the lumber itself, at that meeting?

A. Well, I told Mr. Schaefer then he probably won't be able to get that volume of lumber here locally, even if he pays \$60.00, because lumber is hard to get in Yakima, I already investigated myself, and if that's just what worry him, he got to pay \$60.00, I'll see you get the lumber cheaper than that.

Q. You're talking too fast.

A. I told Mr. Schaefer if it's just the lumber worrying him: I can get it cheaper to him.

Q. Did you explain to him why? A. Yes.

Q. What did you tell him?

A. I told him we had a priority, and we built a lot of defense house projects, and we also include so much lumber for this job.

Q. Did you tell him what housing project you had priority for at that time?

A. Yes, I told him first Stadium Homes, also some in Bremerton, some in Port Angeles, and we was able to get lumber [1586] for him.

Q. Now, I ask you specifically whether or not in that conversation you told Mr. M. C. Schaefer or

(Testimony of Sam Macri.)

William E. Schaefer that you had an interest in a lumber mill? A. No, sir.

Q. What, if anything, did you tell them with respect to a lumber mill?

A. I told Mr. Schaefer we furnished \$10,000.00 to some sawmill so it can supply us with \$10,000.00 worth of lumber. In other words, we pay cash in advance for \$10,000.00 worth of lumber to deliver to us.

Q. And in that conversation did you designate the lumber mill?

A. I don't remember; I don't tell him which mill, no.

Q. You didn't tell him which mill? A. No.

Q. What if anything else was said about lumber in that conversation with Mr. Schaefer?

A. Well, then he told me as long as I can get the lumber that way, for me to supply lumber. I told him "All right, give me your figure you want, and I'll supply lumber" and he gave me a figure of \$26.00.

The Court: The last figure I didn't get.

A. \$26.00.

Q. That's \$26.00 for what? [1587]

A. For me to furnish the lumber to him.

The Court: Per cubic yard, I presume.

Q. Was it \$26.00 per cubic yard?

A. Cubic yard, including reinforcing steel and the metal work and the concrete.

Q. Now, then, is it or is it not your statement the \$26.00 included performance of item 12, the

(Testimony of Sam Macri.)

concrete structures, item 13, placing reinforcement bars——

A. Yes.

Q. ——and item 16, installing gates?

A. Yes.

Q. Now, was there at that time any conference or any reference to item 15 in exhibit 3, erecting timber in structures?

A. No, not that time.

Q. And tell me, please, whether or not at the time of this conversation with Mr. Schaefer and his brother a contract was drawn up and signed?

A. After we got together with the price we drove to Stadium Home Office over there; we had another office there.

Q. Where was Stadium Home office?

A. It was a defense project, and we had an office there. We took care of all the purchasing and writing and everything in that office.

Q. Is that another part of Seattle, or not?

A. Oh, it's about, I judge, about a mile and a half from my original office, up on the hill.

Q. And who was over at the Stadium Home Project when you and Mr. Schaefer and his brother drove there?

A. All the office force, the bookkeeper and Mr. Hjorth was over there.

Q. Who?

A. Hjorth. He was our estimator, and he took care of that stuff.

Q. And his first name is Nels, is it, Mr. Macri?

A. Nels.

(Testimony of Sam Macri.)

Q. Will you tell me whether or not you introduced the two brother Schaefers to Mr. Hjorth?

A. I did.

Q. And will you tell the Court what conversation, if any, in which Mr. Hjorth also participated, occurred in that office before the contract was drawn?

A. Well, Mr. Hjorth, he did all the estimating, and also he prepared the additional words in the sub-contract. He handled all that kind of stuff himself.

Q. Now, tell me whether or not while you were at the Stadium Homes office a contract was prepared? Did you say Mr. Hjorth did it?

A. Well——

Q. How was it done? Just tell the Court how it was done. [1589]

A. After we got together we explained to Mr. Hjorth how they wanted those words, and the way he usually do, he mark with a pencil, and then he hand to the stenographer to type.

Q. Well, can you tell me whether or not he made that on one of these blank form sub-contracts, or not? A. Yes, Mr. Hjorth did.

Q. Calling your attention to plaintiff's Exhibit 5, can you remember and tell me whether or not the typing at the bottom of page 1 and the typing in the portion at the top of page 2 was in that form when Mr. Hjorth had it typed, or were there subsequent changes? Can you tell me?

A. Well, this stuff was changed afterwards.

(Testimony of Sam Macri.)

Q. Now, when you say "This stuff was changed afterwards" will you indicate, please, what you mean by "this stuff"?

A. Well, that's some reinforcing steel. The subcontractor is supposed to furnish reinforcing steel.

Q. Yes, Mr. Macri, for the purpose of the record, you have indicated, have you not, a portion of the line directly below the word "describe" and over to the typewritten word on the line below reading "and," ahead of the word "necessary"?

A. Yes.

Q. Now, what you indicated is this portion which is X'd out, is that correct? [1590]

A. Well, there was some form lumber here, and I naturally agreed to furnish form lumber myself.

Q. Well, never mind the naturally; I'm asking whether or not this which is X'd out was in the form when Mr. Hjorth returned it.

A. What do you mean?

Q. Well, when it was brought back typed.

A. Well, yes, then Mr. Schaefer read it over in there.

Q. All right, then similarly with reference to the typing, I am directing your attention to the words in the fourth line from the top of the page, in different typing, "forms at completion to be property of the general contractor." Was that in when it was brought back by Mr. Hjorth, or was that added later? A. Added later.

Q. All right, skipping the next paragraph, to the paragraph following that, and reading "All

(Testimony of Sam Macri.)

materials except form wire, nails, and curing material will be furnished by the general contractor or/and owner. Sub-contractor will furnish the above wire, nails and curing material"; and the additional paragraph: "Sub-contractor will pay to the general contractor \$42.00 for power hook-up, and 90 per cent of the light and power bill, unless it is elected to make use of separate meter set-ups"; was that in when Mr. Hjorth brought it back, or was that added [1591] later?

A. Well, that was added later, when we look it over.

Q. All right, then what happened with respect to those items? Just tell the Court how those happened to be—how that change was made there.

A. Well, first he was going to furnish his own lumber, and then I agreed to furnish the lumber for him, and changed the figure in that, and also he was going to set up his own camp, and I had a camp set up, and I turned it over to him, so we added these words to it.

Q. Now, will you tell me whether or not the power hook-up was to your camp? A. Yes.

Q. And you say you agreed to turn that camp over to him? A. Yes.

Q. And tell me whether or not there was a discussion with respect to the payment of electric hook-up and power? A. Why, yes.

Q. Now, was it on that same day that these changes which I've indicated were made, or was it a later time? A. No, it was on the same day.

(Testimony of Sam Macri.)

Q. And can you tell me who made those changes? I mean who had that typing done; I mean did you have that, or did Mr. Schaefer, or how was that done?

A. Well, Mr. Schaefer and I went in together to Mr. Hjorth [1592] and he took this——

Q. May I understand, please, the contract in the original form that was typed there in the larger typewriting was prepared by Mr. Hjorth, and then the elimination of the portion I've indicated and the addition of the other in the smaller typewriting was done by Mr. Hjorth, and all on the same day, is that correct? A. Yes.

Mr. Olson: That's objected to as being leading.

Mr. Holman: It is. It is a summation, is all I was trying, your Honor.

The Court: Proceed.

Mr. Holman: May he answer?

The Court: He's already answered. Go ahead.

Mr. Holman: He said "yes."

Q. Now, was that contract signed on that day by Mr. Schaefer, or not?

A. By Mr. Schaefer and myself.

Q. Signed on that day, sir? A. Yes, sir.

Q. And can you tell me whether or not that is the date which the contract bears, which I think is indicated as the 14th of March, 1944; was that the day it was signed, do you remember?

A. Well, I can't swear now if it was on the 14th day; he took [1593] it over on that day.

(Testimony of Sam Macri.)

Q. At the time of the execution of that instrument in that form as you indicated was there any bond by Mr. Schaefer delivered to you or not, do you recall?

A. Why, yes, he delivered a bond with me.

Q. At that time, or later, Mr. Macri? Do you remember?

A. I remember he delivered a bond same day we signed.

Q. And did you look at that bond at that time? May I have Exhibit 34, Mr. Clerk? Handing you Exhibit 34, bond signed by the Glens Falls Indemnity Company, I'll ask you whether or not it was called to your attention by Mr. Schaefer or you otherwise knew that the signature of Mr. Schaefer was not on that bond?

A. No, I never noticed it.

Q. When did you first discover that Mr. Schaefer had not signed that bond?

A. Until you tell me, after you look him over.

Q. Well, when was that, about?

A. When they started this law-suit.

Q. When they started the law-suit. Now, I'll ask you whether or not before Mr. Schaefer signed the contract you had any discussion with him as to the manner of excavation for structures, as to the kind of work you were going to do, and the kind of work he was going to do?

A. You bet; I asked myself Mr. Schaefer how he wanted his [1594] excavations done, and the answer was he said "Well, you know, a small struc-

(Testimony of Sam Macri.)

ture like that, why, just give me about a foot clearance; that's all I'm interested in," so I said all right.

Q. Will you tell me whether or not at that time of signing the contract there was any discussion with respect to machinery or equipment between you and Mr. Schaefer and his brother?

A. Machinery equipment?

Q. Yes, was there any discussion about machinery, or I should say equipment, for the job, not machinery. Did you have any discussion with him about machinery—about equipment, pardon me.

A. Oh, yes, I asked him what kind of equipment he was going to take on the job. He said something about he got one of those Mixmobiles, he said, and he's going to buy a small Buggymobile. I told him "I think that Mixmobile will be too big equipment for that small structure." He said "Oh, no, that's all right." The Buggymobile, I said "You don't have to buy one, I'd be glad to help you, I got one you can use if you wish." He said "Oh, no, I think I'm going to get one."

Q. Was there any discussion between you and Mr. Schaefer with respect to you being powered sufficiently with equipment to perform the excavations ahead of his structure [1595] work? Did you have any talk on that?

A. We had plenty to shovel to do it——

The Court: Strike the answer and ask the question again.

(Testimony of Sam Macri.)

Q. What I want to know, Mr. Macri, is whether or not in your talk with Mr. Schaefer and his brother there was any discussion between you and him as to your having the equipment ability and the set-up ability to keep ahead of the unit 12, concrete excavations.

Mr. Olson: If your Honor please, I realize that counsel is having some difficulty with this witness, but it seems to me, this man has been in construction work a long time, he says, and he can sit down and relate a conversation that took place.

The Court: I'll sustain the objection to that question, as leading.

Mr. Holman: I don't intend to lead, I assure counsel. It is really difficult.

Q. Can you tell me anything else, now, Mr. Macri, in connection with the conversation you had, between Mr. Schaefer or his brother and yourself, at the time of signing this contract, as part of that transaction?

A. Yes, I told him how I'm going to do the excavation for him.

Q. What did you tell him? [1596]

A. I told him I was going to have a power machine to rough it out first, and then a hand crew and they finish by hand.

Q. Was there anything said with respect to that as between you gentlemen, any answer by Mr. Schaefer, did he give any answer, or not?

A. No, he said it was all right. Matter of fact, I asked him myself, I said "How about the sub-

(Testimony of Sam Macri.)

grade?" I told him "You know, this is all small structures." He said he prefer to have it higher, when you do it by hand just do a little higher; I realize those forms, you can get them up to a 16th, they always can be leveled off and stretch them out. I said "All right, have it any way you want it."

Q. Now when, Mr. Macri, after the signing of this contract, did you first learn that Mr. Schaefer was making any claim about the walls of the excavations not being on a slope?

A. The first time I ever heard of that slope proposition was when they started in this law-suit in your office, I never heard of no slope by Mr. Schaefer before.

Q. Did you ever have any written communication from Mr. Schaefer with respect to slopes of the excavations, before the time of commencing this law-suit? A. I never did.

Q. Now, Mr. Macri, I wish to direct your attention to Macri's identification 14, and directing your attention, Mr. [1597] Macri, to identification 14; for the purpose of the record, your Honor, the government copies of the progress and final estimates left here by the witness Pease, and including the final estimate, which for the first three pages of it has been marked as plaintiff's Exhibit 61——

The Clerk: Mr. Holman, that's all of it. Attached to there are copies that I've made to be substituted later, under the request of counsel that asked me to make copies.

(Testimony of Sam Macri.)

Mr. Holman: In other words, this is not government compilation?

The Clerk: No.

Q. All right, then, including plaintiff's Exhibit 61, will you please tell the Court how those monthly estimates and final estimates were used as between the government and you and plaintiff, and Mr. Schaefer, under the sub-contract, with respect to units performed? I don't want you to read off the items.

A. Well, this is a regular monthly estimate prepared by the Bureau of Reclamation, and different items of the work that's done each month.

Q. Well, now, just a minute; for the one that is marked estimate number 1, April, 1944, when would you currently receive that estimate; in the month of April, or would it be in the month of April? [1598]

A. No, that's work done in the month of March, and we receive in April.

Q. About what time of the month?

A. On the 20th, each month.

Q. Now, then, Mr. Macri, that would be so, would it, for about the 20th, of each month, of the various estimates that are indicated through there, numbered 2 right on through including 12?

A. Well, I want to make sure about it; I'm not sure. It is the 20th or the 25th, but that's close.

Q. Now, estimate number 1, as an item 7, can you answer me this, Mr. Macri: Are the items numbered 1 through 28 in the first column the same

(Testimony of Sam Macri.)

units as the items numbered 1 through 28 on pages 3 to 5 of Exhibit 3? A. Yes, they are.

Q. All right. Then just for clarification, your Honor, item 1, while not designated as "Excavation common for laterals" means that in reality, but you know what they are by reference to this?

A. Yes.

Q. All right, sir. With reference to item 7 for the month of April, 1944, estimate number 1, did you receive the compensation as shown by that estimate of \$1,892.93 net? A. Yes, we did.

Q. And turning, then, to the same item 7——

A. Item 7, that's structure excavation——

Q. ——for the month of May likewise?

A. Yes.

Mr. Olson: Now, if your Honor please, if what counsel is intending to do is go through each of these estimates to show how much Mr. Macri was paid for the common excavation, we object to it as being wholly immaterial, proves nothing as far as any controversy between Schaefer and Macri is concerned.

Mr. Holman: That's not my purpose. I assure counsel it is not my purpose.

The Court: Is this on the excavation, by way of illustration?

Mr. Holman: Yes, and I'm trying to the place where 8 shows too. Number 7 shows only, on number 3 for the month of June.

Mr. Olson: If that isn't counsel's purpose, then I object to it. I don't see where it is material.

(Testimony of Sam Macri.)

Mr. Holman: All right, I'll present this question, and I would really appreciate presenting my case without too much interference, if it is within reason.

Direct Examination

(Continued)

By Mr. Holman:

Q. Did you receive copies of each of the estimates, number 1 to and including number 12, for the month of March, 1945, with respect to this specification 1062, schedule 1? [1600]

A. Yes.

Q. And did you receive those currently each month with a check for the amount as indicated there, in due course, from the government?

Mr. Olson: That's objected to as being immaterial, whether he received the money or didn't.

Mr. Holman: I submit it is material, because the very next question is whether or not Mr. Schaefer was paid by Mr. Macri.

Mr. Olson: That's something else; whether or not the government has paid him is wholly immaterial.

The Court: There's a provision in the contract that payments were to be made to Mr. Schaefer as they were made by the government.

Mr. Holman: Yes, that's exactly the point.

The Court: Overruled. I presume, nevertheless, that wouldn't apply to the items covered by the sub-contract; you're not making any contention

(Testimony of Sam Macri.)

Macri can hold up payments to Schaefer because he didn't get payments on the excavation?

Mr. Holman: Oh, no.

The Court: All right, go ahead.

Mr. Holman: That was my purpose in directing attention to the first of these items that did not have item 12 in, or any related items. [1601]

(Whereupon, the reporter read the last previous question.)

A. Yes.

Q. Will you tell me whether or not currently as you received compensation for any of the items, 12, concrete structure, 13, placing reinforcement bars, 15, erecting timber in structures, or 16, installing gates and miscellaneous metal work, you currently transmitted to Mr. Schaefer payment under his sub-contract for the items shown performed thereby?

Mr. Olson: The question is objected to as being leading.

The Court: It is leading.

Mr. Holman: I'll withdraw it, your Honor. I call upon counsel to produce under our demand the copies of the statements for the checks transmitted to Mr. Schaefer for performance under his sub-contract. I have a written demand in for it. I would like to have it at this time.

Mr. Olson: Well, the checks I assume have been returned to Mr. Macri.

Mr. Holman: The part I'm asking for is the portion that shows the payment of those checks.

(Testimony of Sam Macri.)

The Court: You'll have a reasonable time to produce that, a demand made at this time. You can wait until the night recess. [1602]

Mr. Holman: I have made a written demand, your Honor.

The Court: Oh, I see. I thought you were making a demand at this time.

Mr. Olson: I guess it wasn't a notice to produce, but it was referred to in the deposition, and I have them available. I even have some that you didn't have in there, Mr. Holman.

Mr. Holman: Well, off the record, I am grateful.

The Court: I appreciate the difficulty in carrying on an examination without leading a little, but you were very strict in your objections, and I feel I must rule the same on both sides.

Mr. Holman: Your Honor, I appreciate your ruling that way, and I hoped I would reach the point where I wouldn't lead, but it is hard to do. May I have these marked for identification, Mr. Clerk, as one exhibit and sub-numbers, including the envelopes attached?

(Whereupon, voucher part of checks, Macri to Schaefer, were marked defendant Macri's Exhibit No. 76 for identification.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 76, I'll ask you whether or not you

(Testimony of Sam Macri.)

recognize the yellow portions there as coming from your office, and the [1603] envelopes attached as coming from your office? A. Yes.

Q. Now, what is that yellow portion, Mr. Macri, those yellow sheets, what are they?

A. Well, this is the monthly estimate; when we received from the government we usually paid to the contractor that proportion.

Mr. Olson: I move that be stricken as not being responsive.

(Whereupon, the reporter read the last previous question and answer.)

The Court: Well, I think that is a general explanation. I'll let it stand.

Q. What I'm primarily interested in, Mr. Macri, whether that yellow is all you send, or if it is part of something else.

A. Well, some of those we mark either on the checks, sometimes the bookkeeper sends a regular statement along.

Mr. Holman: I move that be stricken as not responsive.

The Court: It will be stricken.

Q. Are those yellow sheets detached from a check, or do they accompany a check, or are they sent that way, without a check?

A. Oh, no, a check goes along with this. [1604]

Q. Attached to it, or part of it?

A. Yes, attached to it; it's one check.

Q. Is this the voucher part of the check?

A. Yes, and we've got the cancelled check ourselves.

(Testimony of Sam Macri.)

Mr. Holman: I offer identification 76 in evidence, your Honor, for the purpose of illustration of the manner of compensation between Macri and Company and M. C. Schaefer under sub-contract 1062, assuring the Court that I will have the complete accounting as part of my case in chief. This is merely for the purpose of showing the manner of transmittal.

Mr. Olson: I wish to object to their admission, your Honor. It is not complete. The witness' testimony shows it is only part of the transmittal. I think if they're going to offer them in evidence they should put in evidence the whole part of the transmittal, not just part of it.

Mr. Holman: I limited my offer, your Honor, not to proof as to amounts, but as to the means; that's all I'm offering them for.

The Court: I'll admit them for the purpose indicate, to illustrate the method of payment.

(Whereupon, defendant Macri's Exhibit No. 76 for identification was admitted in evidence.)

Mr. Holman: Your Honor, Mr. Olson now has his copy [1605] of the deposition, and if your Honor would permit, I would like to present that.

The Court: I think Mr. Olson said he wanted to look it over before it is read, and I don't suppose he's had an opportunity to do that.

Mr. Olson: I haven't even opened it yet. It was brought in here a few minutes ago.

Mr. Holman: I'm sorry.

(Testimony of Sam Macri.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, will you tell me, please, after the signing of the sub-contract for specification 1062, schedule 1, whether or not you visited that work? A. I did.

Q. About how often would you visit, Mr. Macri, go on the work?

A. Oh, when we began the work I was over there for a considerable time, but after that I used to make a run practically once a week.

Q. I'll ask you when, if you recall, you first met either Mr. M. C. Schaefer or Mr. William Schaefer on the job? Do you recall the time?

A. Yes, during the month of April I saw Mr. William Schaefer.

Q. Month of April; and specifically with respect to the date of April 29, 1944, can you tell me whether it was before or after that, or on that date?

A. No, that was before then.

Q. It was before that? A. Yes.

Q. About what time, Mr. Macri? Do you recall?

A. Oh, I judge it was during about the 20th of April, somewhere about that neighborhood.

Q. About the 20th, you say? A. Yes.

Q. In advance of that, had there been any communication to you about the manner of performance of the structure excavation? A. No.

(Testimony of Sam Macri.)

Q. When and where did you first meet either Mr. M. C. or Mr. William Schaefer, do you recall?

A. Well, I met Mr. William Schaefer on the job first, which was him and Mr. Waltie, and he introduced him to me, he say he was his superintendent or his foreman, and he had to get over in the field, and that was in the beginning, when they start to set some structures in the field, and I talked to him and asked him how he get along, and Mr. William say "Well, this kind of stuff is new to us; we'll be all right in a couple of weeks; we try to break ourselves in." I says "All right, if there is anything I can do let me know," and he says "All right, I'll let you know." [1607]

Q. That was William Schaefer?

A. That's William Schaefer, yes.

Mr. Holman: And in that connection, your Honor, I wish to direct the Court's attention to Macri's Exhibit 13A and 13B and 13C, the report of the inspector, J. S. Hears, the concrete inspector J. S. Hears. I understood, your Honor, that the preference was that these not be read into the record, but they be admitted as exhibits. They have been admitted as exhibits.

The Court: Well, it isn't necessary to read them into the record, but if you want to call my attention to them, I had better see them.

Q. Now, is that the first time after the signing of the sub-contract with Mr. Schaefer that you had any meeting upon the job with either Mr. Schaefer, either M. C. Schaefer or Mr. William Schaefer? Is that the first one?

(Testimony of Sam Macri.)

A. First time I was Mr. William Schaefer, yes.

Q. Well, had you seen Mr. M. C. Schaefer there before that? A. No.

Q. And when next, if you recall, did you see either Mr. M. C. Schaefer or Mr. William Schaefer?

A. That was a short time after that; they say April 29. It might be April 29. I can't swear myself about it.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous question and answer.) [1608]

Q. And will you tell me whether or not there had been in advance of seeing either of those gentlemen at that time any appointment made with you to see them?

A. No, sir, they never had no appointment made with me.

Q. And will you tell me whether or not your superintendent made any appointment with you to meet them at that time?

A. No; I went on the job over there and I been told Mr. Schaefer is on the job and was looking for me.

Q. Where did you go on to the job from? Where were you?

A. Well, first I went in the office there. We had an office over there in the camp.

Q. Yes.

A. And they told me Mr. Schaefer was on the job, and they wanted to see me, so I said "Why?"

(Testimony of Sam Macri.)

Q. Do you remember who told you?

A. Yes, a guy in the yard over there, one of the carpenters.

Q. And where did you meet either of these gentlemen on that day?

A. I met them over there by the first lateral, that's 59.3, I think it was; it wasn't very far from the office there, so I drove the car and I met them over there, Mr. Schaefer and his assistant, and also I sent for Mr. Staples, my superintendent; I sent a truck driver to go and get him, because he was in the field to help do some structure [1609] digging.

Q. Do you recall who was at this meeting where you saw Mr. Schaefer?

A. Well, I saw Mr. Schaefer and his brother was over there.

Q. Yes.

A. And I think one of his foremen, his carpenter foreman was there, and I heard his name was Waltie, it probably was Waltie, and that's about all I seen over there.

Q. Now, where did you meet them, Mr. Macri?

A. Well, it was about the road over there in the first lateral, and I noticed they mention that structure 18, probably is structure 18, which that was dug wrong, the shovel had dug a little too deep on one side, and that's one they pointed me out about this structure, they say "Look at this structure here, it's not dug right." I say, "I can see

(Testimony of Sam Macri.)

that, all right; we're going to fix for you." That's the reason I called Mr. Staples, "Get your men now, we're going to fix up this structure, and from now be very careful and see that it is done right." That's about all that was said then.

Q. Now, I'll ask you whether or not at that time you told Mr. M. C. Schaefer that he was to do two-tenths or three-tenths of the excavation himself? A. Did not.

Q. Sir? [1610] A. I did not.

Q. And I'll ask you whether or not at that time and in that meeting Mr. Schaefer made a statement in substance to you—that you made a statement in substance to Mr. Schaefer as follows: "I will pay you for all of the extras, just get going"?

A. I did not.

Q. I'll ask you whether or not at that time Mr. M. C. Schaefer answered in substance this: "I said"—referring to him, "you're going to pay for all of the expenses; I am never going to be stymied again." Was there any statement like that, Mr. Macri, or not?

A. He never told me such things.

Q. I now ask you whether or not you replied in substance "That's it"? A. No, sir.

The Court: We'll take a ten minute recess.

(Short recess.)

(Testimony of Sam Macri.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Holman:

(Whereupon, the reporter read the last previous question and answer.)

Q. And directing your attention to the statement of the witness Waltie at the meeting, at which he stated Mr. [1611] Staples, Mr. Macri, Mr. William Schaefer, Mr. M. C. Schaefer, and himself were present, on April 29, 1944, and I'll ask you whether or not you made the following statements at that time, or any of them—— A. Did not.

Q. Just a minute; I'll ask you whether or not this occurred: "Mr. Schaefer told Macri that he was not going to do any fine grading." Was there any such statement made at that time?

A. Fine grading?

Q. By Mr. Schaefer, to you.

A. Well, they point out to me that the structure wasn't dug right, on the 29th.

Mr. Olson: I move that be stricken.

The Court: It will be stricken.

Q. I want you to answer yes or no. I asked this witness the time and place and who was present, and I've indicated that to you. Now I want to know whether or not at that time Mr. Schaefer told

(Testimony of Sam Macri.)

you he was not going to do any fine grading. The answer will be yes or no.

A. I don't quite get that question now.

Q. Mr. Waltie has testified on the stand that on April 29 at the meeting between you, Mr. M. C. Schaefer, Mr. William E. Schaefer, Mr. Staples, and yourself, Mr. M. C. Schaefer made the statement that he was not going to do [1612] any fine grading. Now, was that statement made or not, within your presence and hearing?

A. There was no statement by Mr. Schaefer about the fine grade.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Q. Now, I'll ask you whether or not at that time you said to Mr. Schaefer in substance this: "Not to worry about costs, I will pay for that"; that Schaefer said it was not only the time lost, but it was the time held up, and that you said to Mr. Schaefer, that's M. C. Schaefer I'm talking about, "I will see that the job goes ahead so there will be no more waiting and no more digging." Now, did you make that statement, or did Mr. Schaefer make that statement?

A. I did not.

Q. Sir? A. I did not.

Q. And did Mr. Schaefer make that statement to you, the statement of Mr. Schaefer being that it wasn't only the time lost, but it was the time held up?

A. Never made such statement.

(Testimony of Sam Macri.)

Q. Now, I'm directing your attention to the testimony of the witness William E. Schaefer, and I'm reading, your Honor, [1613] from the transcription as furnished me by Mr. Taylor at my request, as follows; if you listen, now, I'm reading this transcribed testimony to you, and I want to question you, Mr. Macri:

“Question (by Mr. Olson, it would be on direct examination): All right, now, what did you do and what was said in Mr. Macri's presence and in Mr. Staples' presence?

Answer: We complained about the excavations.

Question: What did you say about them?

Answer: They were all dug vertical, none of them room enough to put in our forms, she-bolts, or strong-backs, and the excavation wasn't any part of the Concrete Construction's contract, we wasn't to have anything to do with the excavating. Well, Mr. Macri said the boys made a mistake, and that we'll make them bigger.

Question: What did he say about the slope, if any, of the banks?

Answer: Well, he said they'd excavate them to a slope so we could get the forms in and out, and my brother mentioned to him that it was—it cost a lot of money to do that excavating, and it wasn't any part of our work, and he said 'Why don't you take over the excavating,

(Testimony of Sam Macri.)

the fine grading?'; brother says 'I don't want anything to do with it'; he says, 'You take it and I'll pay for it'; brother says 'No, that's none of our work, [1614] and I don't want it; we've spent too much money on this now, trying to get started' he says, 'If this keeps up, we tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, otherwise we could take these panels to another structure without hauling them to the yard and hauling them back,' and he says 'Don't worry about that, I'll pay all your costs and expenses on that job; let's get it started and quit arguing about it.'

Question: Is that the substance of the conversation as you remember it?

Answer: Yes.

Question: Now, about how many excavations, or structures, I should say, did you check?

Answer: At that time?

Question: Yes.

Answer: I believe three or four.

Question: This was on the 29th of April?

Answer: The 29th of April.

Question: All right, now, did you find anybody doing any hand excavation on any of those structures?

Answer: That same day, on structure 18, next to the road, Fred Waltie and George

(Testimony of Sam Macri.)

Schuler were excavating, and M. C. Schaefer pulled them off the excavation. He says 'We're doing too much of this now.' [1615]

Question: Were any of Macri's men there doing any excavation?

Answer: I didn't see any.

Mr. Holman: Pardon me, who?

Answer: George Schuler.

Question: Whose employee was George Schuler?

Answer: They were Concrete Construction employees.

Question: Did Mr. Macri say anything to Mr. Schaefer that day in your presence as to the amount of money Concrete Construction Company would make on this job?

Answer: Yes, he did. He made the remark that nobody ever lost any money.

An objection by Mr. Hawkins, an objection by Mr. Holman, and the Court overruled, and said he may answer, then Mr. William E. Schaefer continuing his answer:

Answer (Continued): He said nobody ever lost any money on Macri's job, and he wasn't either, that we should make between eleven and twelve thousand dollars on this job."

Q. Mr. Macri, I want to ask you whether any of those statements which were attributed or shown

(Testimony of Sam Macri.)

as having been made by you were made by you at that time and place?

A. No, sir, none of those statements.

Q. Sir?

A. None of those statements ever been made by me.

Q. And I want to ask you whether or not any of those statements [1616] which are shown by this that I read to you as having been made by M. C. Schaefer was made to you at that time or place?

A. No, sir.

Q. Now, will you tell me to the best of your recollection what was the conversation between M. C. Schaefer or William E. Schaefer and yourself, or with Mr. Waltie, or in the presence of any one of those three, the very best you recall?

A. The true words that they were saying that day, I met Mr. M. C. Schaefer on the job, I only talked with M. C. Schaefer, and of course his brother was over there, and his superintendent was a little ways over there, but M. C. Schaefer and myself did the talking, and all he point out to me that the structure, which I admit that structure was over-dug, over there, we was willing to fix for him, and also he pointed out another little structure over there, which he had his foreman, he said "See here, now, this little structure," which was a little square box which was about half up above the ground, only about a foot and a half deep where the form went down, he said "This here was a little too snug, a little too tight." I said "Well,

(Testimony of Sam Macri.)

you got the form in, it's all right to just go ahead and pour." He says "Yes, but pulling the form out"; there's a rock there, all you got to do is use a [1617] little force on the side. He said "Oh, yes, that's minor." Now, that's all that was said that day. There was no hard feeling, argument, or anything else.

Q. Did you make any statement to Mr. M. C. Schaefer or William Schaefer or Mr. Waltie or Staples or any of them as to making any payment of any kind? A. I did not.

Q. Sir? A. I did not; not that day.

Q. I'll ask you whether or not at that time or any time after that there was any bill or statement of any kind for any digging by the Concrete Construction Company sent to you or received by you or delivered to you?

A. No, never no bills.

Q. Now, turning to the matter of lumber, can you tell me in general terms approximately the amount of lumber furnished the job, or do you recall?

A. Yes, all total lumber been delivered on 1062, the records we have, that's in the neighborhood of about 120,000 feet of lumber, besides the plywood.

Q. Mr. Macri, I'll ask you whether or not you were present at any time when there were any measurements of structures, excavations, made in your presence?

A. Yes, I was down first part of June.

(Testimony of Sam Macri.)

Q. First part of June, would that be 1944?

A. '44, yes.

Q. Did you make any memorandum at that time, Mr. Macri, do you recall?

A. Yes, I did make a memo, piece of paper.

Q. When and by whom were those measurements made?

A. By a fellow by the name of Mr. Klugg, who was Concrete Construction carpenter foreman.

Q. Now tell the Court, was either Mr. M. C. Schaefer or Mr. William Schaefer or Mr. Waltie or any other representative of the Concrete Construction Company present at that time?

A. Just Mr. Mercelle and Mr. Klugg and myself.

Q. Mercelle, that's the witness Mercelle who testified here?

A. Yes.

Q. And Mr. Klugg and yourself?

A. Yes.

Q. Tell the Court what was done at that time, will you, please?

A. Well, I asked Mr. Klugg why this Concrete Construction don't start to pour concrete, they got so many holes ahead and everything, and some windstorms and everything, we'll have to do everything over, just be a waste of time and expense. He said "I don't know." I said "Let's make sure, now, because I want to call Mr. Schaefer; you're their man, you understand all about it, [1619] we'll measure to see if everything's perfect," and it was all set, so he said "All right." He got hold of Mr. Mercelle, I thought he was truck driver but he said

(Testimony of Sam Macri.)

on the witness stand he was a carpenter foreman, so Mr. Mercelle drive his own truck, and Mr. Klugg and I went, and Mr. Klugg had his book, and he started one by one, and him and Mr. Mercelle did the measuring, of course; I just watch all that, and he don't find nothing wrong, and I asked him if he mind if I marked once in a while, 1, 2, 3, 4, as we went along, and we went about as far as a piece of 75, and he only find on one corner a quarter of an inch off on two of those structures. He say "That don't amount to anything"; I said "We can have that done." That's all he find, two out of 75. I said "Shall we go ahead?" He said, "No, let's go home, it's quite a time; I'm pretty sure that's all right," and we went.

(Whereupon, memo made by Macri was marked defendant Macri's Exhibit No. 77 for identification.)

Q. Handing you what has been marked Macri's identification 77, I'll ask you whether or not the figures above the portion where it is marked had anything to do with that at that time?

A. No, this is a notation what he gave to me on 1068, Mr. Schaefer. [1620]

Q. Then with reference to the figures on the reverse side, the opposite from which Macri's 77 has been indorsed, will you tell me whether or not those are the notations you made at that time?

A. Yes, that's notations what I made.

(Testimony of Sam Macri.)

Q. Will you tell me whether or not that is the paper about which counsel interrogated you, asked you at the time of his taking your deposition, and you said you would get it if possible?

A. Yes.

Mr. Holman: I would like to detach this portion that the witness has shown as not pertaining to this meeting, your Honor, and offer the rest in evidence, or leave it on, I don't care, but it will have to be referred to in respect to 1068; it probably had better be detached.

The Court: Well, you can detach it. Any objection to that, Mr. Olson?

Mr. Olson: I suggest your Honor take a look at that. It certainly is a self-serving notation, and it is meaningless, at best, if you can read it. It says "1 O.K." and "2 O.K.," or something like that. It doesn't mean anything. It is his conclusion.

Mr. Holman: I'll hold the offer until I identify that, your Honor. I was concerned about separating the [1621] two parts. If you would give that other another exhibit number, Mr. Clerk, I'll use it later.

(Whereupon, memo of figures submitted by Schaefer to Macri on 1068 was marked defendant Macri's Exhibit No. 78 for identification.)

(Testimony of Sam Macri.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Now, calling your attention to Macri's Identification 77, will you tell me, please, what these numbers indicate, whether they indicate a structure number or the number of structures that you checked; what do they indicate?

Mr. Olson: I object to that question as being leading and suggestive, an improper question, and I ask that the witness be now precluded from answering that question.

The Court: Well, the objection is sustained, as leading.

Q. Tell the Court what those numbers do indicate or represent.

A. Well, we went along on the job, like it says, "2 O.K."; he measured two of those structures, and then we went along and there was seven O.K., and I marked "7 O.K."; and I say "2 low on the one corner"; they were a little low; out of all this trouble here we find two a little low.

Mr. Olson: I ask that answer be stricken as not responsive. The question was what they meant and indicated. [1622] He said we went along and found them all right, and I put O.K.

The Court: Motion denied.

Q. And can you tell from that, Mr. Macri, the total number that were inspected?

A. Yes, we inspect altogether about 27; no, 26.

(Testimony of Sam Macri.)

Q. 26 structures?

A. 26 places. Some places two or three structures on one place.

Q. 26. All right. Now, will you explain to me how identification 78 happened to be part of that same paper?

A. Yes, it was a paper I had in my pocket. That's the same portion.

Mr. Holman: I now offer in evidence Macri's identification 77, your Honor, a copy of which, the best we were able to give, has been furnished counsel by letter on February 12.

Mr. Olson: We object to the introduction, your Honor, on the ground that it is meaningless in the first place, and states merely this man's conclusion; there's not any testimony as to any fact, and that it is purely a self-serving document, prepared by this witness.

The Court: On what basis is this offered, Mr. Holman?

Mr. Holman: Offered as evidence in view of the [1623] fact that counsel in the deposition asked specifically that it be produced here, your Honor, and we're complying with counsel's' request, otherwise it wouldn't be offered.

The Court: Well, the request for production of a document doesn't bind counsel to let it be admitted.

Mr. Holman: No, your Honor, but we were obligated to produce it under our undertaking with counsel, and I have done so.

(Testimony of Sam Macri.)

The Court: Sustain the objection. I think it is all right for him to have used it to refresh his memory, but it is not a part of his books or records.

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, at the time of your being present in the field with Mr. Klugg and Mr. Mercelle, can you tell me what was the size, if you remember, of the crew of the Concrete Construction Company? What had happened there, do you recall?

A. Well, all the whole crew I recall they had was Mr. Klugg and Mr. Mercelle, and one man, I don't recall his name; they had three men.

Q. As as a result of that meeting did you then communicate with Mr. Schaefer at all, Mr. M. C. Schaefer? did you talk or anything with Mr. Schaefer?

A. Yes. I got in touch with Mr. Schaefer by telephone.

Q. Where from, the job, or from Seattle, do you recall? [1624]

A. I gave him a ring from my office in Sunnyside and I asked him why he don't come in to pour concrete, we got so many holes ahead, and they would be spoiled if he didn't go ahead, and some of his forms would be spoiled, leaving in the hole, so I told him I don't care about the lumber, but there's no sense wasting the forms, labor, and everything

(Testimony of Sam Macri.)

else. He says "I've been told by my people that everything's wrong." I told him to come over himself so we can prove the fact, the truth. He says "Yes, I'll come over, and I'm going to bring my bond man along." I says "that's all right with me; if that the case I better bring an engineer to solve all this stuff; your men tell you they're not right, my men tell me they're right, you don't come yourself." He said "All right, I'll be over there and bring my bond man." I said "I'll bring an engineer along, we settle everything once for all," so we made an appointment and we met over there and I bring an engineer along, and he had his bond man.

Q. Who was the engineer you brought?

A. L. Cohen.

Q. And who was the bond man he brought?

A. It was that gentleman here, I forgot his name, he testified that day.

Q. We agree it is Mr. Hunter. [1625]

A. Mr. Hunter, I guess it was. Well, we went on the job——

Q. Now, just a minute, Mr. Macri. I do not want to get those matters unresponsive. Did you meet Mr. Schaefer and Mr. Hunter?

A. Yes, we meet that morning.

Q. Which Schaefer was that?

A. M. C. Schaefer.

Q. Mr. M. C. Schaefer; and who else was present, if you recall, of the Concrete Construction crew other than Mr Schaefer?

(Testimony of Sam Macri.)

A. I think Mr. Waltie was over; he was the only one he had, the first man that he had on the job.

Q. Now, I want to ask you with respect to that meeting, Mr. Macri, where was that meeting, at the job office, or in the field, or where?

A. On the field.

Q. How did you happen to contact them? Did you go out into the field with them, or were they out there, or what? Just tell the Court how you happened to meet with them, if you remember.

A. I'm positive now where I meet them; I know the meeting took place over there in the field.

The Court: Did you understand the question, Mr. Macri, how you happened to meet them?

A. Yes, I tried to think if I met them first in the office [1626] and then in the field; my mind isn't clear on that. Now, we had a meeting in the field all right, but whether we meet over there, or first in the office, my mind isn't fresh on that, and I don't like to swear anything I'm not sure about.

Q. Did you make any statement in the hearing and presence, to Mr. M. C. Schaefer, in the hearing and presence of Mr. Waltie and Mr. Hunter and Mr. Cohen, do you know? Did you make any statements about this job then, in their presence?

A. Was any statement made?

Q. Well, were you all together, or were you separated, or how; was there a meeting there, or were you along the line, or what?

(Testimony of Sam Macri.)

A. First, when we went on the job,—am I allowed to explain to the Court the way it was happened?

Q. Yes, I would like to have you explain how you went on the job, yes, sir.

A. All right. When we went on the job Mr. Schaefer and Mr. Cohen, my engineer, they spoke together among themselves. Now, this bond man and myself, we was a little ways. I asked him, I say "What's the purpose of their bringing you here." He say "I don't know; he told me to come along so I did." That's all right. So then Mr. M. C. Schaefer he spoke out and he said "Here, this is done wrong." Well, [1627] I say "All right, if it's done wrong we'll fix it." He said "Yes, but one of my men, I've been told he put up two hours worth of work, and it was not his job to do it." I told him "Mr Schaefer, if your man put up two hours, and it's our mistake, send us a bill, and even if it is \$10.00 I'll send you a check for it." He said "Well, I don't care to do that." The bond man said "Macri, you know some of those sub-contractors, they always got some squawk coming," and I said "I understand that all right, but this was a small matter anyhow." I told him "This is an essential job, we're in a war here, and we should go ahead and finish this job." He says "Yes, I'm going to talk to Mr. Schaefer, and everything's going to be all right." He said "I don't see nothing to squawk about; even the minor stuff, there's only two or three of those," so after that I never heard

(Testimony of Sam Macri.)

that testimony, say "You're going to pay," different times. That never existed, such a words.

Q. Now, I want to ask you specifically with respect to the testimony of Mr. Waltie at that time and place. This is Mr. Waltie testifying now. I want to ask you whether or not this is correct and occurred in your presence or hearing: "Schaefer was insisting that he didn't want to go on as the job was being done, that the costs were very high and he hadn't got anything done, and Macri said he [1628] didn't have to worry about the cost, that they would have an engineer on the job Monday to see that things were done proper. Macri said two tenths or three tenths was nothing to be concerned about, and Schaefer said anything but absolutely fine grade was Macri's responsibility. Schaefer said he wanted nothing to do with it, and Macri wanted Schaefer to take over the fine grading." Just a minute, now. I'll ask you whether or not that conversation occurred in your presence or hearing?

A. Never in my presence there hasn't been that.

Q. And directing your attention, Mr. Macri, to a portion of the testimony of the witness Allyn R. Hunter as transcribed by Mr. Stanley D. Taylor, the court reporter: "Question: Now, Mr. Hunter, will you go ahead and tell what took place, what was said, in Mr. Macri's presence? Answer: Mr. Macri, Mr. Cohen, Mr. Schaefer, Fred Waltie and myself went out on the project to look over some of the project, and Mr. Schaefer and Mr. Macri started arguing right off the bat as to the structure excavations,

(Testimony of Sam Macri.)

so we drove out in our car; I couldn't give you the exact location, however, Mr. Waltie had a layout plan with him which I suggested he bring along. We went out and looked at maybe four or five structures that were in, and on both occasions Mr. Macri and Mr. Schaefer were arguing about how tight they were, and there wasn't room [1629] in my opinion to put in the forms properly." And there was a ruling there, and an objection, your Honor, to that last statement, then the answer continues: "We walked on up and looked over several of the holes which had been dug, evidently by a hoe, and I would say that we looked at four or five holes, over a matter of a half mile walking, or something like that. They were roughly excavated, and I got down in the hole with Mr. Waltie and measured up the approximate yardage in the hole, the distance out, and the length of it. Question: What did you find? Answer: And these holes were not long enough, they were not wide enough, for structures. As to their elevations in the bottom, there had been no work done, just the hoe teeth showed in there, and the soil was of such a nature that it could be excavated much wider to get your forms in properly. Question: Were there on that day, or did you on that day check any excavations that the fine grading had been done in, or were there any? Answer: Not as to the elevation in the bottom of the holes, no. I had no level or anything there to check the exact fine grading in the bottom of the holes, which would require an in-

(Testimony of Sam Macri.)

strument. Question: Did you check any of the excavations for alignment? Answer: Just from the hubs, yes. Question: What did you find in that regard? Answer: Well, I would say that it was a typical [1630] excavation of a hoe, without any hand work being done on the structure excavation." Now, particularly to this, Mr. Macri: "Question: Now, did any conversation ensue there, Mr. Hunter, in Mr. Macri's presence? Answer: Mr. Macri requested Mr. Schafer to take over the fine grading, and Mr. Schaefer said 'I will not have anything to do with the fined grading,' and argument *pursued*; finally Mr. Schaefer told him that as soon as he got the fine grading on the button, that he would start out and put in his structures, his forms, and pour his structures, and keep going, but he had to have enough of this ahead to keep him going, and Mr. Schaefer was very, very definite as to the structure excavation at that time being on the button. Question: I'd just like to interrupt here; was there any work going on on the project at the time? Answer: Not to my knowledge, there was nothing going on. Question: Then proceed with the conversation. Answer: So Mr. Macri said "Well, if you will get your men down in the holes and take care of this additional work, I will pay you for it" and Mr. Schaefer said 'I'll not do any of that work; that is not my job' and at that time Mr. Macri spoke up and said 'If you will do any of this additional work here that necessitates any extra expense or cost to you I'll

(Testimony of Sam Macri.)

pay for it'." Then objections, and your Honor's ruling, and continuing: "Answer: At that time Mr. Schaefer [1631] spoke up and said "I have not received any compensation for any extra work I have done on these holes up to date; I don't see where I can receive any from here on out, therefore I do not want anything to do with the structural excavation and fine grading" so we then left this particular area and started back in the car, or walking back to the car, and Mr. Macri and I were talking together, in the presence of the other men, and Mr. Macri said 'I will have Mr. Cohen on here the first of this next week to take over, and we'll see that this excavation is done properly'; and Mr. Cohen said that if he come out to handle that work, he would see that it was done properly. Mr. Schaefer said 'Well, it remains to be seen what will happen between now and the first of next week'."

Then an additional statement that Mr. Taylor did not type, but I get from my own notes, Mr. Macri said "I will take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you, Schaefer; that no man has lost any money on Mr. Macri's jobs, and you are no exception."

Now, will you please tell me whether or not those conversations which I have detailed to you from this transcribed testimony, and the last one I gave you, occurred in your presence or hearing?

A. I never make such statement. [1632]

(Testimony of Sam Macri.)

Q. Was any such statements made by you or to you by Mr. Schaefer, as indicated there?

A. Not in my presence.

Q. And did you make any such statement in the presence of Mr. Hunter as the last one I read you "I will take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you, Schaefer; that no man has lost any money on Mr. Macri's jobs, and you are no exception"; did you make that statement, or not?

A. No, sir, the only statement I made, as I said a minute ago, he said one of his men spent two or three hours on some work that don't belong to him. I said "Even if that's \$10.00, mail me a bill and I'll mail you a check for it," so he never sent me a bill, and I never mailed him a check for it, and that's the true words that we said over there.

Q. Mr. Macri, at that time was there any statement made by Mr. Schaefer to you that he would increase his crew and complete the performance of the sub-contract? Did Mr. Schaefer make any such statement to you?

Mr. Olson: That question is objected to as being leading again, your Honor.

Mr. Holman: Well, I'll withdraw it. I don't mean to be leading. [1633]

Q. When next did you see or know of Mr. Schaefer being on that job?

A. Well, after that meeting took place I only saw Mr. Schaefer once on the job, and that was I

(Testimony of Sam Macri.)

stopped in the office and he wouldn't talk to me, and I never saw him no more. That's the only time I ever talked with Mr. Schaefer as far as the job was concerned.

Q. Where was Mr. Schaefer and where was you when you last saw him on the job?

A. I was in the office and he was in the car. He just went straight through and never stopped there.

Q. Now, did you at any time after that see Mr. Schaefer on the job to talk to him?

A. No, I never talked to him at all after that.

Q. And again after that, did you again have any talk with Mr. William E. Schaefer?

A. No, sir, I never met Mr. William E. Schaefer after that meeting.

Q. These typewritten court reporter records which I have read into the record I have previously given you and asked you to read, had I not, Mr. Macri, and you had read them?

A. Some I did, yes.

Q. Yes. I'm looking for one additional statement, your Honor. [1634]

The Court: Yes, all right.

Q. And I don't seem to locate it easily. I'll ask you whether or not you made any statement to Mr. Staples, George Staples, that you had told him that regardless what you said to Schaefer to go ahead and do as he had been doing; did you make any such statement?

(Testimony of Sam Macri.)

A. The only statement I made with Mr. Staples, to go ahead and do the job as best you have done, and not give those people a chance to complain.

Mr. Olson: I ask that be stricken as not responsive.

The Court: It will be stricken.

Q. Now, will you please tell the Court what instructions you gave Mr. Staples after this meeting with Mr. Schaefer? I'm asking for the same answer, your Honor.

Mr. Olson: I'm objecting to any instructions he gave Mr. Staples, as being immaterial.

The Court: Is it supposed to be in the presence of any of the other parties?

Mr. Holman: No, your Honor. I was looking for some one of the witness' statements, who made the statement that Mr. Staples had told him that he had instructions to do the work. I just can't locate the statement right now, your Honor, so I'll withdraw that question.

The Court: We may as well suspend at this time. [1635] This case will be resumed at 10 o'clock tomorrow morning.

(Whereupon, the Court took a recess in this cause until Thursday, March 13, 1947, at 10 o'clock a.m.)

Yakima, Washington, Thursday, March 13, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may I suspend the examination of Mr. Macri and present this deposition here?

The Court: Yes.

“Deposition of Harold T. Nelson

“Be It Remembered that on this 8th day of March, 1947, at the Bureau of Reclamation office near Boise, in Ada County, State of Idaho, at 1:30 p.m., the deposition of Harold T. Nelson, a witness on behalf of the defendants Macri, was taken pursuant to the attached Notice.

“Appearances: Harry L. Olson, Attorney-at-Law, of Yakima, Washington, counsel for the use plaintiff.

“Tom W. Holman, Attorney-at-Law, of the firm of Brethorst, Holman, Fowler & Dewar, of Seattle, Washington, counsel for the defendants Sam Macri, Don Macri and Joe Macri.

“There were present at such hearing, in addition to the above counsel, the use plaintiff, M. C. Schaefer, William E. Schaefer, and Patrick L. Darcy, who have [1636] already appeared as witnesses in the current trial of the above-entitled action; and Mrs. M. C. Schaefer. None of the defendants appeared in person.

(Deposition of Harold T. Nelson.)

“It Was Stipulated by and between counsel at opening of this deposition hearing that, upon consent being given in the record by the witness thereto, the necessity of the reading back of the deposition as transcribed, and the signature thereof by the witness, is waived; and that upon transcribing the testimony of said witness the same may be certified by Frank J. Kester, the undersigned Notary Public in and for the State of Idaho, before whom said deposition is taken, and by him transmitted directly to the office of the Clerk of the above-entitled Court under seal, there to remain until published by order of the Court.

“It Was Further Stipulated that all objections, other than to the form of the question, may be reserved for all parties, both those now appearing and those served with the Notice, until the publication of the deposition and reading thereof before the above-entitled Court.

“Whereupon, the following proceedings were had, to wit:

“HAROLD T. NELSON

“called as a witness on behalf of the defendants Macri, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows, upon [1637]

“Direct Interrogatories

“By Mr. Holman:

“Q. Will you state your name, your place of residence, and your present official position, if any,

(Deposition of Harold T. Nelson.)

with the Bureau of Reclamation of the Interior Department of the United States?

“A. Harold T. Nelson, 1219 North Twenty-fourth, Boise, Idaho; Assistant Regional Director of the Bureau of Reclamation, Department of the Interior. That’s for Region One, which comprises the northwest states.

“Q. Mr. Nelson, did you formerly hold an official position with the Reclamation Bureau of the United States Department of the Interior, during the years 1943 through 1945, in the Yakima area?

“A. Why, yes; I was stationed at Yakima from 1937 until July of 1946, on the Roza Division of the Yakima Project.

“Q. By the way, Mr. Nelson, you issued many official communications at that time; and can you tell me whether or not you also used the signature and destination, ‘H. T. Nelson,’ frequently?

“A. Yes, that is the signature that I use on all official correspondence and documents, ‘H. T.’

“Q. Mr. Nelson, for the purpose of the record, will you explain the general scope and purpose of the Roza Project itself?

“A. The Roza Division of the Yakima Project will irrigate a [1638] total of 72,000 acres of land extending in a southeasterly direction from about approximately twelve miles north of Yakima to the vicinity of Benton City, Washington, some ninety-eight miles in length. The area irrigated will be a strip of land of one to four miles wide lying above all of the existing irrigation developments on the

(Deposition of Harold T. Nelson.)

east side of the Yakima River, particularly above the Selah-Moxee Canal, the Union Gap Canal, the Sunnyside Division of the Yakima Project, and several smaller canals, several smaller pump laterals out of the Sunnyside Canal.

“Q. (By Mr. Holman): Mr. Nelson, I neglected previously to ask you to state your qualifications.

“Mr. Olson: We will admit those.

“Q. (By Mr. Holman): For the purpose of the record I would like to have you give your qualifications, including your educational qualifications.

“A. I am a graduate civil engineer. I also have a Master's Degree in civil engineering. I was on the faculty of Montana State College as an instructor in civil engineering for three years, and I served also for a period of some two and a half years for the State Highway Commission of Kansas, prior to entering the Bureau of Reclamation in the Dams Design Section in the Chief Engineer's Office in Denver, Colorado. I was transferred to Yakima from Denver, Colorado, in 1937. [1639]

“Q. Mr. Nelson, request had previously been made upon you by me, on February 22nd of this year, at Boise, to attend the trial of the above action if possible; and have you been precluded from doing that?

“A. Yes, at the present time the status of our work is such that Mr. R. J. Newell, the Regional Director, did not think, in consideration of the

(Deposition of Harold T. Nelson.)

Government's interest in this case, and in further consideration of our work load, that I could be justifiably spared for that assignment.

“Q. Mr. Nelson, will you amplify a little bit your statement in your last answer as to the interest of the Government in the above litigation?

“A. The interest of the Government at this time would be purely an indirect one, due to the fact that the litigants were engaged in the performance of a Government construction contract. The contract itself has been accepted. final estimate has been rendered, with release of contract by the Macri Company; therefore, there is no further direct relationship.

“Q. Mr. Nelson, there have already been introduced in evidence at trial Plaintiff's Exhibit 1, certified copies of contract and bond on Specifications 1062-1; Plaintiff's Exhibit 2, certified copy of contract and bond on Specification 1068; Plaintiff's Exhibit 3, Specification 1062-1; Plaintiff's Exhibit 4, Specification 1068; Plaintiff's [1640] Exhibit 5, sub-contract between the defendants Macri as prime contractor and the use plaintiff, M. C. Schaefer, for performance of a portion of the work called for by the prime contract on Specification 1062-1; and Plaintiff's Exhibit 6, subcontract between the same parties for performance of a portion of the work called for by the prime contract on Specification 1068. I have brought with me copies of such prime contracts and specifications, and I would like

(Deposition of Harold T. Nelson.)

to inquire whether or not you have here available copies of the prime contracts and specifications governing them, from which you could testify.

“A. I have here only a copy of the official specifications. There is on file in our Legal Department a copy of the contract. This is not a copy of the contract; this is a copy of the specifications which are attached to the contract. We have, however, in our files, copies of all.

“Mr. Holman: I ask counsel if he has any objection to referring to the copies I brought with me, for interrogating this witness.

“Mr. Olson: I have no objection to their being copies.

“Q. (By Mr. Holman): With reference to Specification 1062-1, Mr. Nelson, would you kindly state the portion of the area of the project you have previously designated into the Record that is included for work under that contract [1641] number 12r-14825?

“A. This work comprised the construction of a lateral and distribution system below the main canal from approximately mile 59 on the main canal to approximately mile 70 on the main canal, which is roughly the area from the Sunnyside-Hanford Highway to the Benton County line.

“Q. The particular contract to which I have directed your attention covers what laterals?

“A. Gravity laterals 59.3 to 69.8, and sub-laterals.

(Deposition of Harold T. Nelson.)

“Q. Will you explain, please, Mr. Nelson, what, for instance, the first lateral you mentioned, 59.3, indicates, as to the location of that lateral?

“A. That corresponds to the mile point on the main canal from which the lateral starts; in other words, this particular lateral 59.3 takes out of the Yakima Ridge Canal at mile 59.3.

“Q. And that would hold for each of the other laterals? A. Yes.

“Q. Again referring you to the same designated contract and the specifications attached thereto, can you tell me the bid items that were involved in Specification 1062-1? A. Yes.

“Q. Would you mind indicating them by number?

“A. Do you wish me to go through all twenty-eight bid items?

“Q. No, sir, I do not; I just wanted the statement there, by [1642] numbers; number what to what?

“A. Our work is broken down into a series of unit price items, by which the work may be evaluated for purposes of awarding the contract and also by means of which payment may be made conveniently for all of the work performed. In this particular contract there are twenty-eight pay items in Schedule 1, comprising Excavation as Item 1, continuing through all of the Structure items and Concrete Pipe Lines, Metal Work, etc., to Item 28.

“Q. Now, Mr. Nelson, with reference to those items and particularly directing your attention to

(Deposition of Harold T. Nelson.)

the entry Item 7, Excavation Common for Structures, and the printed words there, 8250 cubic yards, what is that quantity?

“A. That quantity, Item 7, is an estimated quantity for the purposes of comparing bids, in advance of performance of the work, of the cubic yards of material that will be excavated under the classification Excavation Common for Structures. There is also a succeeding item, Excavation Rock for structures.

“Q. That’s Item 8? A. That’s Item 8.

“Q. And your answer would be similar for the printed 200 cubic yards? A. Yes.

“Q. Then turning to Item 9, Backfill about Structures, 8650 [1643] cubic yards, would your answer be the same with respect to that yardage?

“Mr. Olson: That question is objected to as being wholly immaterial, as backfill is not involved in this litigation.”

The Court: It will be overruled.

“A. Item 9, as for all other items, is an estimated quantity.

“Q. And specifically, the same answer would obtain for the estimated quantities for Item 12, Concrete in Structures, Item 13, Placing Reinforcement Bars, and Item 16, Installing Gates and Miscellaneous Metal Work?

“A. Yes. We do not guarantee that these quantities are exact.

“Q: Now directing your attention to Item 5, Excavation Common for Pipe Trenches, was that

(Deposition of Harold T. Nelson.)

excavation classification and estimated quantity involved in the Excavation for Structures and Concrete in Structures?

“A. No, the Excavation for Pipe Trenches, where a pipe trench takes out of the structure, is considered as stopping outside of the structure excavation lines except as provided in the specifications where a lateral or pipe trench is continuous through a structure. They are not, however, an overlapping item.

“Q. And where they are continued through a structure, what would be the limits of the respective pay items?

“Mr. Olson: I would like to have the record show [1644] that this question is objected to on the ground that the specifications cover the subject matter of the question, and that the question does not ask for the best evidence.”

The Court: Overruled.

“Q. Well, Mr. Nelson, you were the engineer in charge, were you not? A. Yes.

“Q. I am asking you, from your experience as the engineer in charge, the answer to the last question.

“A. For purposes of payment the specification provision for Structure Excavation is considered as applied in all cases. It's impossible to give a specific answer without studying the circumstances surrounding each and every structure, but in general the Excavation item for each structure is calculated

(Deposition of Harold T. Nelson.)

first and the prism contained within the lateral or ditch section is then subtracted from the overall computation, for purposes of arriving at the net yardage paid as Structure Excavation.

“Q. Mr. Nelson, you will find at the back of the specifications which you have before you some graphs or maps. Can you indicate by calling the page number those which involve concrete structure and those which involve other of the twenty-eight items you have indicated as incorporated within the prime contract?

“A. I presume you refer to the attached profiles?—— [1645]

“Q. Profiles; thank you.

“A. (Continuing): which designate the hydraulic properties of each lateral, the grade line which indicates the amount of excavation and the location of each structure and type of structure. Further reference is necessary to individual structure drawings, in order to obtain the detail of a number of the pay items, such as pounds of metal work, imbedded wood work such as gauge blocks. The profiles are not intended to be all-inclusive.

“Mr. Holman: Will you read my question, please?

“(Former question read).

“The Witness: Would you read that question again?

“(Question again read).

(Deposition of Harold T. Nelson.)

“Mr. Olson: I would like to have the record show our objection to that question, unless it’s tied into the concrete structures on this specific job.”

The Court: Overruled.

“Mr. Holman: Yes, I want to add that, ‘for specific contract in question.’

“A. It is necessary to refer to the drawings attached to the profiles, in order to indicate the occurrence of all of the contract items. In other words, I would be merely quoting the entire set of attached drawings, as well as the profiles.

“Q. Then is it your answer that they are all to be considered [1646] for performance of Items 7, 8, 9, 12, 13, and 16?

“Mr. Olson: That question is objected to as being leading.”

The Court: Overruled.

“Q. State whether or not it is your answer that they are all to be considered for performance of Items 7, 8, 9, 12, 13, and 16.

“Mr. Olson: I would like the record to show that we object to the question on the ground that it’s leading, and on the further ground that the contract and specifications speak for themselves.”

The Court: Overruled.

“A. These drawings do have a bearing on the performance of those items; and in addition, a large number of detailed drawings which were issued from time to time by the contracting officer, specifically the structure lay-out sheets which were furnished as a supplement to the standard drawings contained in the specifications.

(Deposition of Harold T. Nelson.)

“Q. Mr. Nelson, there is already admitted in evidence Plaintiff’s Exhibit 12, which the Clerk has indicated ‘Structure Lay-Out on Specification 1062.’ Are those what you have in mind?

“A. Yes.

“Q. What is the function, in performance of the prime contract and any sub-contracts issued thereunder, of the [1647] structure lay-out drawings? What’s their practical application, Mr. Nelson?

“A. The structure lay-out drawings are issued to illustrate the combinations of standard structures represented in the specifications as applied to each turn-out point and structure site designated on the profiles. The structure lay-out sheets show the combination of standard structures, the elevations, grade lines, directions of flow pertaining to each of the structure lay-out points as these points are staked in the field. The specific data as to elevation and direction varies from point to point, even through the structures involved are in themselves standard structures.

“Q. Now, digressing for a minute to Specification 1068, Mr. Nelson, I make available to you the contractor’s copy of Contract number 12-r-14996, together with a copy of the specifications and profiles and drawings referred thereto, and I will ask you, therefrom, if you are similarly able to indicate the scope of the work on the Roza Project covered by that contract.

“A. That contract covered a continuation of the gravity lateral system below the main canal from

(Deposition of Harold T. Nelson.)

approximately mile 70 to mile 85 of the Yakima Ridge Canal, or from the Benton County line to Snipe's Creek.

“Q. And does the work under that latter contract that I have [1648] indicated also tie by lateral numbers to the same Yakima Ridge Canal as previously testified by you pertaining to Specification 1062-1?

“A. Yes, laterals, 59.3 to 69.8—correction: 70.1 to lateral 84.6, and sublaterals, and in addition the East Turbine Lateral, station 260-plus-00 to the end, including East Turbine Lateral wasteway and diversion channels, mile 51.74 to mile 58.45, and those mile points, the latter mile points, are mile points along the Sunnyside Main Canal.

“Q. Further with reference to that prime contract, are the thirty-six items which are indicated in the schedule the items involved in performance of that contract?

“A. The thirty-six items comprising Specification number 1068 directly comprise work to be performed under Contract 12r-14996.

“Q. And again with respect to this contract, the number of which you have just given, Mr. Nelson, are the quantities which are indicated for those respective thirty-six items bid upon, the estimated quantities for similar purposes as you indicated in your testimony with respect to Specification 1062-1?

“A. They are similar; they cover similar types of work, but differ in structural detail, such as size of pipe line.

(Deposition of Harold T. Nelson.)

“Q. Mr. Nelson, there has been marked for identification in [1649] the present trial of the case, as produced by Mr. Harold Pease of the Bureau of Reclamation in Yakima office, a Defendants Macri Identification number 14, designated as the monthly estimates of progress for compensation; and as similarly bearing identification numbers for the defendants Macri, number 15, Macri and Company payrolls; number 16, M. C. Schaefer payrolls; number 17, monthly control reports, April, 1944—April, 1945, pertaining to both—this latter pertaining to both Specifications 1062 and 1068; similar Identification number 18, concrete inspector’s daily reports, XD 1975, pertaining to Specification 1062; similar Identification number 19, daily reports of inspectors on contract under Specification 1068; similar Identification 20, monthly estimates for progress for compensation; and similarly indicated Identification 21, Macri payrolls under Specification 1068. I wish, please, you would, if you are able, indicate into the record the manner in which those respective identifications that I have called are used through your office, as engineer in charge, toward determination of compensation under the respective contracts; and for that purpose, Mr. Nelson, I will now indicate them severally: Defendants Macri Identification 14, the monthly estimates of progress for compensation under Specification 1062—that would be prepared how and by whom? [1650]

(Deposition of Harold T. Nelson.)

“Mr. Olson: That’s objected to as relating to a document that’s not before the witness. We object to this question, or, we object to this witness being interrogated as to written documents that are not submitted to him for examination, and further on the ground that the question relates to matters that are not involved in the controversy between the use plaintiff and any of the defendants, and is therefore irrelevant and immaterial.”

The Court: Objection will be overruled.

“Mr. Holman: I am willing to have your objection go to all these ones I have indicated, because I have none of them here, since under the terms of their surrender by Mr. Harold Pease of the Bureau of Reclamation and the direction of the Court they would remain in court until either admitted in evidence and substituted by copies so that the originals could be returned or for return to the said Bureau of Reclamation if not admitted in evidence.

“The Witness: As I understand the question, you are asking specifically, now, about the monthly progress estimates for payment to the prime contractor?”

“Mr. Holman: That’s true.

“A. Monthly estimates for payment are made not only as this contract but on all of our lateral contracts, as an approximate payment for work performed under the contract up to that time, less hold-back and deductions. In the [1651] case of lateral contracts the progress estimates are based

(Deposition of Harold T. Nelson.)

as far as possible upon quantities of the various items of work as measured in the field and computed in the office, with the addition of certain calculated quantities. The items are given a final audit, and adjustments if necessary are usually made at the time the final estimate is rendered.

“Q. Now I deliver to you, Mr. Nelson, for the purpose of your inspection, the contractor’s copies of estimates under Specification number 1062-1 for the month of April, 1944, to and including the month of March, 1945, as estimates number 1 to 12, and estimate number 13, final, a part of which has already been admitted in evidence as Plaintiff’s Exhibit 61 at trial, and will ask you if you can indicate therefrom whether or not these are copies of the estimates which were issued for such Specification 1062-1 under your direction and supervision as engineer in charge.

“A. These appear to be copies of the monthly estimates above referred to.”

Mr. Holman: May I digress there, your Honor? I was under the impression until after that the last part of 61 had not been admitted, but I found it was a copy of the exhibit itself. Continuing:

“Q. Similarly, Mr. Nelson, I hand you what appear to be copies [1652] of estimate number 1 under Specification number 1068 for the month of July, 1944, and subsequent monthly estimates to and including estimate number 15 for the month of September, 1945, and estimate number 16, final, for the month of October, 1945, and will ask you to

(Deposition of Harold T. Nelson.)

state similarly with respect to those; number 16, final, having already, for part thereof, at least, been admitted in evidence at trial as Plaintiff's Exhibit 62.

"A. These copies of progress estimates numbered from 1 to 16 do appear to be copies of similar estimates prepared by our office under Specification 1068."

Mr. Holman: At this time, your Honor, I would like to offer in evidence under the testimony of Mr. Nelson Macri's Identification 14, to and including estimate number 12, March, 1945, and as part of our offer, although already admitted in evidence, but to co-ordinate to the plaintiff's Exhibit 61; in other words, that's the complete estimate.

Mr. Olson: Your Honor please, we object to the introduction of those exhibits on the ground that they're not the best evidence as to what took place; they're simply reports made by inspectors to the Bureau of Reclamation, neither of which parties are parties to this suit, and they're not binding upon the use plaintiff, and it is not the proper way to prove any issue of this case. [1653] The inspectors were here, and they can testify to what took place, and if it is material, why, that's the way to prove it, not by some written reports that they've sent in to the Bureau of Reclamation office.

The Court: Those are the progress reports?

Mr. Holman: These are the government's own estimates of the work as they progressed.

The Court: Progress reports?

(Deposition of Harold T. Nelson.)

Mr. Holman: What they call the monthly estimates, your Honor.

Mr. Olson: Those are the payments on the contract?

Mr. Holman: Yes.

Mr. Olson: Then we make the further objection, your Honor, that any payments between the government, or by the government, to Macri Company is immaterial, as far as the Concrete Construction Company is concerned.

The Court: Overruled. It will be admitted. That is identification 14?

Mr. Holman: Identification 14, your Honor.

(Whereupon, defendant Macri's Exhibit No. 14 for identification was admitted in evidence.)

Mr. Holman: Similarly, your Honor, and based upon the testimony of the deponent Nelson as a witness, I wish to offer in evidence estimate number 1 for the month of July, 1944, numbered 1, to and including estimate number [1654] 15 of September, 1945, being Macri's identification 20, and also estimate number 16 of October, 1945, as correlated thereto, and now being plaintiff's Exhibit 62.

Mr. Olson: Well, that one is already in, isn't it?

Mr. Holman: Yes, but I want my reference to tie to it. I can't re-offer that.

Mr. Olson: We make the same objection, your Honor, as to the previous offer.

The Court: Overruled. It will be admitted.

(Whereupon, defendant Macri's Exhibit No. 20 for identification was admitted in evidence.)

(Deposition of Harold T. Nelson.)

(Whereupon, counsel continued to read the deposition of Harold T. Nelson, as follows:)

“Q. Now I ask you whether or not, in the progress of the work, copies of the current estimates were furnished the prime contractor for each of these specifications that I have indicated—Specifications 1062-1 and 1068—furnished by the Bureau to the prime contractor. A. Yes.

“Q. Now, with reference to such estimates for Specification 1062, can you indicate, please, when the first estimate of any bid item is shown to be a quantity paid upon toward completion of performance thereof?

“Mr. Olson: That question is objected to as asking the witness to testify as to the contents of a written [1655] document that's not in evidence, and is not the best evidence.

“Mr. Holman: I will strike the question. I think that's a good objection.

“Q. Mr. Nelson, with reference to the respective items bid upon under Specification 1062-1, will the preliminary estimates as issued by your office currently as the work progressed, indicate when an item first became a computed pay item as progress for that item?

“Mr. Olson: I make the same objection as I made to the previous question.”

The Court: Overruled.

“Q. I am directing your attention now, in my question, to the identification I have indicated as

(Deposition of Harold T. Nelson.)

having been delivered to the Court by Mr. Harold Pease from the Bureau records, and as marked Identification therein as Defendants Macri number 14.

“A. Yes, sir, the copy indicates the first significant progress payment is made for the month of April, 1944.

“Q. Will you amplify that, how it indicates it, with reference to that estimate?

“Mr. Olson: Let the record show the same objection.

“Mr. Holman: Yes.”

The Court: Overruled.

“A. The record indicates that earth work items were performed [1656] in that month, consisting principally of excavation for laterals together with excavation for pipe trenches and some structure excavations; and I might add that I can recall that from memory, as well.

“Q. Then will you state whether or not, in the progression of these estimates to the number 12 as indicated, the respective item numbers and the items under the column ‘this month’ would indicate progressive performance similarly for all the items indicated in the second column?

“Mr. Olson: Let the record show the same objection.”

The Court: Overruled.

“A. In a general way they do show progressive performance. I wish to point out, however, that they do not show exact performance, because fre-

(Deposition of Harold T. Nelson.)

quently corrections are made in previous months' estimates. It's entirely possible for payment to be made for an item in a particular month, even though that work may have been performed in a previous month; so that the payments made in a particular month do not always mean that all of that work was performed in that month in which payment was made.

"Q. And similarly, would the lack of indication of estimated quantity as to any unit indicate that there was no performance of that unit done that month?

"A. I would say that they would indicate that there was a [1657] lack of significant performance. There might have been minor performance, in which the cost of measurement would exceed the payment.

"Q. Now directing your attention specifically to Item 7, or the copy of estimate number 7, for October, showing 19.2 as performance, would that refer to cubic yards?

"A. Yes, all quantities under Item 7 are cubic yards.

"Q. And with reference to estimate number 8, for the month of November, 1944, and the quantity of performance for that month of 6.9 cubic yards, coupled with Item 8 for 18.6—is that cubic yards too, Mr. Nelson?

"A. Yes, that would be cubic yards.

"Q. Would that be similarly so?

"A. You mean, would that indicate performance of those quantities in that month?

"Q. Yes.

(Deposition of Harold T. Nelson.)

“A. Not necessarily. I would be inclined to think, from the small size of those items, that they are calculated adjustments. However, that could be exactly verified by reference to the records on file in the Project Office.

“Q. Then with reference to estimate 9 for Item 7, estimate 10 for Item 7, and estimate 11 for Item 7, can you tell me whether or not those were performed items or a re-determination of pay quantity? I am particularly directing your attention, Mr. Nelson, to the amount of 504.6 in [1658] estimate 6 and 737.7 in item 10, and nothing in estimate 11 or in estimate 12 for the month of March; and then to 332.0 for Item 7 in the number 13 final for the month of June, 1945.

“A. There, again, I would not be in a position to give you an exact breakdown as to how much each of those quantities represents performance in that month, except that I do know that the final for June does include a great deal of adjustment, some adjustment items that may go back through the life of the contract. However, the size of the item in estimate 9 and 10 are such that some performance must have been performed during that month. We would not pay quantities of that magnitude without specific performance. I wish to state in connection with the use of those estimates that they are just exactly what they state: They are estimates. They aren't warranted to be exact until the final is issued. You must realize that in order that the contractor may receive his payment on time,

(Deposition of Harold T. Nelson.)

it is necessary for the field engineer to close his books two or three days in advance of the delivery of the data to the office in Yakima; there is usually a one or two or more days' time-lag. Frequently, it is necessary for our field engineer to estimate what the performance of the contractor would be on the day during which they prepare his monthly estimate, and the contractor may or [1659] may not have performed the amount estimated during the last two or three days of the estimated period, which overage or under-run would be taken up in the next month's estimate or in the final estimate.

"Q. Mr. Nelson, what, in the performance of the work, is the function of the control reports and structure and concrete reports, monthly control reports, April, 1944, to April 1945, which have been marked Defendant Macri's Identification 17, and Macri's Identification 18, concrete inspector's daily report, XD 1975? How are those used with respect to the performance under the contract?

"A. We are required to maintain a file of inspectors' reports. The requirement is not specific as to the content or the number, but the earthwork inspector's report form and the concrete inspector's report are designed to provide the contracting officer with a factual statement of each day's performance under the contract, with particular reference to methods employed, equipment in operation, and labor employed. They are not used as a basis for payment, and are retained in our files as a factual record of the day to day performance on

(Deposition of Harold T. Nelson.)

the job in the event disputes arise between the prime contractor and the Government, and to insure compliance with the labor provisions imposed by the Davis-Bacon Act. I presume you refer to the monthly concrete control report? [1660]

“Q. Yes.

“A. Prepared by the concrete inspector.

“Q. And the concrete reports of the Bureau, also.

“A. The monthly concrete control report is a report required by a special division of the Chief Engineer's Office, the Concrete Control Section, and represents a summation of the month's activities, prepared by the concrete control engineer, usually as a result of his own personal observations and by perusal of the daily reports. The report is intended to acquaint the Chief Engineer's Office particularly with the methods employed in the performance of the concrete items, such as placement of concrete, curing of the same, and technical control, and is likewise not used as a basis for payment under the contract. The specifications for concrete work are unusually rigid, which is one of the reasons for the preparation of the monthly report on the concrete items.

“Q. What is meant by an over-run for concrete structures on the job, Mr. Nelson?

“A. The term ‘over-run’ as we use it designates the difference between the cubic yards of concrete going through the mixer, as compared to the calculated quantity contained in the design, expressed as a percentage of the designed quantity.

(Deposition of Harold T. Nelson.)

“Q. Then would an item in the concrete control reports of the [1661] Bureau for 1944 and 1945 reading in substance as follows, for the month of April, 1945, ‘Over-run for the concrete structure on this job was 14.5%’ indicate a factual determination of that percentage? A. Yes.

“Q. Through your office?

“A. Yes, sir.

“Q. To you superior?

“A. (The witness nodded in assent).

“Q. Correct?

“A. Yes. We determine concrete over-runs very carefully, because the materials going into the concrete mix are furnished by the Government, and there is provision in the specifications whereby collection could be made if this item were deemed unreasonable.

“Q. Mr. Nelson, there have been introduced in evidence as Defendants Macri Exhibit numbers 13-a to 13-o, respectively, what are indicated as inspector’s daily reports. Will you tell me, please, who was J. S. Heers and his function in connection with performance on Specification 1062-1?

“A. Jess Heers was employed as the Chief of Party. However, when a contract starts out, and until operations reach a point that justify a separate inspector for various operations, it is customary for the resident engineer in charge of that contract to submit the daily inspectors’ [1662] reports; and Jess Heers, during a portion of the performance time on that job, was in charge of the engineering

(Deposition of Harold T. Nelson.)

party that set stakes, established lines and grades, and in that capacity he also looked after the performance of the earthwork items.

“Q. Now, the Jess Heers whom you have mentioned is the same as the J. S. Heers whose signature is indicated?

“A. Yes. I wish to make it clear that it's entirely possible for a chief of party to submit an inspector's report, even though he himself may not have been carried on our payroll as an inspector.

“Q. Similarly, with reference to Defendant Macri's Exhibit 13 subnumbers d through l, will you state, please, who was R. M. Moorhead, and his duties with respect to the job?

“A. R. M. Moorhead was one of our regular staff of inspectors particularly assigned to concrete work, and he in that capacity served for a time on both specifications 1062 and 1068.

“Q. And with reference to additional Defendants Macri Exhibit number 13 subdivision m, and other reports in that subnumber, indicated as having been made by G. R. Reynolds, who was he and what was his function, Mr. Nelson?

“A. G. R. Reynolds was also one of our inspectors particularly assigned to concrete and concrete pipe items of the work, who participated in inspection work on both Specifications [1663] 1062 and 1068.

“Q. And similarly with respect to Defendants Macri's Exhibit number 13 subdivision number o, who was M. Sektnan?

(Deposition of Harold T. Nelson.)

“A. M. Sektnan was also used as an inspector on Specification 1062.

“Q. I seem not to have brought the identification sub-number for similar inspections by a name of Costello, and I do not have his initials. Who was he?

“A. Mr. Costello was used for brief periods on Specification 1062 as a relief inspector when for reasons of illness or vacation leave the regularly assigned inspector was necessarily absent from the work.

“Q. Mr. Nelson, I will ask the reporter to mark for identification the letter I now proffer you, and will ask you if you recognize it as an official communication sent by you to the principal contractor. (Whereupon a letter dated 21 September 1944, from witness to Macri Company, was marked Defendants Macri's Exhibit A for Identification.)

“Q. Handing you what has been marked Defendant's Identification A.

“A. Yes, that is an official communication which I signed, to the Macri Company, dated September 21, 1944.”

Mr. Holman: I offer that in evidence, your Honor.

The Court: Where is the letter?

Mr. Holman: It is attached to the deposition.

The Court: The first one?

Mr. Holman: Yes, the letter of September 21, 1944.

(Deposition of Harold T. Nelson.)

The Court: Oh, yes, I see here it is marked defendant Macri's Exhibit A.

Mr. Holman: Yes, your Honor.

The Court: I think the most orderly way to handle these would be to detach them from the deposition and mark them with a number in this case.

Mr. Holman: I would think so, your Honor.

(Whereupon, Letter Bureau of Reclamation to Macri dated September 21, 1944, was marked defendant Macri's Exhibit No. 79 for identification.)

Mr. Holman: These were each submitted to counsel over there, your Honor, but he had only an opportunity for a cursory reading.

The Court: Yes. Mr. Olson, do you wish to see this?

Mr. Olson: I would like to see it, your Honor, yes. Now, your Honor, this letter, we objected to the introduction of this letter on the ground that it is certainly incompetent, further that it is irrelevant and immaterial. I assume that the purpose is to show that there was some carpenters available, or a surplus of labor at a certain time. Now, the contents of this letter are something that Mr. Nelson wouldn't be permitted to testify [1665] to, I don't believe, if he were here on the stand, what he was advised by the Carpenters' Union, because it would be hearsay. Now, the mere fact that he sits down and writes a letter and says he was told, that certainly wouldn't make the evidence anything other than hearsay.

(Deposition of Harold T. Nelson.)

The Court: I might say that I think I've seen attached to the deposition here a number of letters by Mr. Nelson to Macri. I think we might as well go into the question now of the admissibility of these letters.

Mr. Holman: It is our position, your Honor, in offering this and the other letters with the exception of one or two which Mr. Nelson by his testimony, and I think this is one of them, shows there was a further communication between him and the Concrete Construction Company, are direct communications from the owner or government to the principal contractor, and are part of the documents controlling the performance of the principal contract, however they may have been, upon whatever they may have been based; so far as the principal contractor is concerned they are directions limiting and controlling his operations, and the terms of the sub-contract as I have read to your Honor comprehends the official contract, the prime contract, and all orders and specifications and other documents in connection therewith. Now, your Honor, it is unthinkable that a prime contractor should have [1666] specific directions or specific information pertaining to the contract that he is performing, and not have the sub-contractor bound thereby. It is possibly a right of the sub-contractor to show by his testimony that he didn't know of the contents of that; if such an offer was made I certainly would object to it as outside of the contractual relationship, and the only way that this could not be per-

(Deposition of Harold T. Nelson.)

inent, in my opinion, your Honor, and that pertains to all communications from the engineer in charge, official communications from the engineer in charge——

The Court: That would include oral as well as written?

Mr. Holman: Yes, your Honor; ——the only way that it could not be competent here would be that counsel has devoted and intends to devote and intends to ground nothing in this case on the contract, and that he's suing for breach of contract, and this would not be competent, and still, unless he has fixed the time where that breach is claimed ahead of the communication, why, it still would control, under the documents. If I may illustrate my position a little further, your Honor, if Mr. Nelson wrote Mr. Macri a communication and signed it Harold T. Nelson, as he says here, anything but his official signature, and upon something that had nothing to do with this [1667] job, certainly it would not be competent, even if it was called to the attention of Mr. Schaefer, but anything that is directing or controlling or regulating the performance of the official contract becomes part of the contract terms.

Mr. Olson: Is your Honor inquiring as to the letters generally?

The Court: Well, I think we might as well discuss the matter as it applies generally. Assuming that Mr. Holman is correct in his assumption that any direction as to the manner of the performance

(Deposition of Harold T. Nelson.)

of the contract between the engineer and the main contractor would be material, nevertheless it doesn't seem to me that would open the door for all sorts of hearsay that might be thrown in by the contracting officer. If the contracting officer met Macri and said "I understand there are 200 carpenters roaming around Yakima without jobs," that wouldn't be evidence to this Court that there were 200 carpenters free.

Mr. Holman: Nor with me.

The Court: What is it you claim is material in this letter?

Mr. Holman: I claim this is all material, because it is an official communication.

The Court: The part that there are surplus carpenters, [1668] as told to Mr. Nelson by some third party not before the Court?

Mr. Holman: Yes, but I'm pretty sure the deposition goes on and shows this particular one was communicated to them.

The Court: Well, then your offer is premature.

Mr. Holman: I'll withhold it, your Honor, and I would like to read these additional questions.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:)

"(Whereupon, a copy of letter dated 6 October 1944, from the witness to Macri Company, was marked defendants Macri's Exhibit B for Identification.)

(Deposition of Harold T. Nelson.)

“Q. Calling your attention to the second paragraph of this Identification A, will you state whether or not in your official capacity information came to you as to there being a surplus of carpenters in the area, available for employment, as indicated by that letter? A. Yes.

“Q. Now, have you an explanation to make with reference to that, Mr. Nelson? If so, please make it.

“A. The purpose of writing this letter was that I was very interested in combating delayed performance of this contract, and the statement had been made to me at that time that there was a shortage of carpenters, and I was advised [1669] at that particular time that the union did not have an unfilled order for carpenters.

“Q. From whom?

“A. From the Concrete Construction Company.”

Mr. Olson: For the purpose of the record, I move that the answer be stricken, on the ground that it's not responsive, and hearsay.

The Court: Well, I'll grant the motion to strike in that. It is purely hearsay, it seems to me, what he understood and what he was told. Do you want to be heard on that, Mr. Holman?

Mr. Holman: Not any further than I have, your Honor. It is just my conception that the prime contractor under the terms of this contract and specifications is absolutely amenable to all orders he gets from the engineer in charge, and that is an

(Deposition of Harold T. Nelson.)

order, at least it is a notation to Mr. Macri that here is a representation made by the Concrete Construction Company that Mr. Nelson has checked and found is incorrect.

The Court: What we have before us now is the statement of Mr. Nelson, the testimony of Mr. Nelson, that the statement had been made that at the time there was a shortage of carpenters. If that isn't hearsay what is it?

Mr. Holman: Well, I would assume, of course, in a court of law, that might be hearsay. [1670]

The Court: What is this, then?

Mr. Holman: This is a court of law, but in the matter of construction of the contract it is my belief and position that any communication that is sent to the prime contractor with respect to the job becomes pertinent for inquiry.

The Court: Well, I'll grant the motion to strike that part of Mr. Nelson's answer that the statement had been made to him that there was a shortage of carpenters.

Mr. Holman: And may we go on with the rest of the communications, your Honor, and rule on all of them?

The Court: Yes, all right.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:)

"Q. Handing you what has been marked Identification B, the original of which has been proffered

(Deposition of Harold T. Nelson.)

and is at present marked for identification by the defendants Macri, to the best of my recollection, I will ask you if you recognize the contents of this copy of such a letter, and if the original was sent by you to both the addressee and to the Concrete Construction Company, as indicated.

“A. I do recall this letter, and to insure receipt in all quarters the original was sent to the Macri Company in Seattle, with a copy to the Macri Company in Sunnyside, and also a copy to the Concrete Construction Company in [1671] Portland.”

Mr. Holman: I think that is “B” we were talking about, your Honor, October 6, 1944. Now, there is a case, your Honor, where he says that a copy was sent to Concrete Construction, and I think there is a copy in here as Macri Identification 40. Your Honor will recall that the original of that communication was proffered to Mr. Schaefer on my cross-examination and dis-avowed by Mr. Schaefer, and therefore the offer was rejected. Now, this is a confirmation by Mr. Nelson with reference to a copy of the same letter, that a copy of that was sent to the Concrete Construction Company. Shall I proceed, your Honor?

The Court: Well, the Court will recess now for ten minutes.

(Short recess.)

(Deposition of Harold T. Nelson.)

(All parties present as before, and the trial was resumed.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:

“(Whereupon, a letter dated 13 October 1944, from the witness to Macri Company, was marked Defendants Macri’s Exhibit C for Identification.)

“Q. Handing you what is marked Identification C, will you state whether or not you recognize that as an official [1672] communication issued by you as construction engineer? A. I do.

“Q. And it was sent to the addressee?

“A. Yes.

“Q. And directing your attention to the first two paragraphs of that letter, Mr. Nelson, I will ask you what was the basis for the statements made therein?

“A. The basis was, contract performance up to that time.”

Mr. Holman: As I understand, I’ll go right through all of them, your Honor, and then make the offer.

The Court: Yes, all right.

“(Whereupon, two letters from the witness to Macri Company, dated 19 and 26 December 1944, respectively, were marked Defendants Macri’s Exhibit D and E for Identification.)

(Deposition of Harold T. Nelson.)

“Q. Handing you what is marked Identification D by the reporter, will you state whether or not that was an official communication sent by you to the addressee during the progress of the performance of 1062-1? A. Yes, it was.

“Q. Handing you what has been marked Identification E, will you state whether or not that was an official communication sent by you as construction engineer to the addressee, as indicated?

“A. Yes, it was.

“(Whereupon, a letter dated 28 December 1944, from the [1673] witness to Macri Company, was marked Defendants Macri’s Exhibit F for identification.)

“Q. With reference to the contents of Identification E, Mr. Nelson, and particularly with respect to paragraph 47 of the specifications in Specification number 1062 mentioned therein, will you tell me, please, how Item number 7 was determined as a pay item for compensation to the principal contractor? By Item number 7 I am referring to Excavation Common for Structures.

“A. You are asking for our basis of payment?

“Mr. Holman: Will you read the question, please, Mr. Reporter?

“(Pending question read).

“A. The specifications provide several alternates for determination of the pay lines for payment of structure excavation. In general it is stated that pay-

(Deposition of Harold T. Nelson.)

ment will be made to one foot outside of the neat lines of the structure and up to the surface of the ground on a one-to-one slope; but it also provides that the basis of payment may be altered as determined by the contracting officer to some other basis as staked by the contracting officer, that is, that the slopes might be varied. Now, in general, in a contract of this type, the structures are so numerous that we fell back upon our option of paying for all of the small structures based upon a theoretical [1674] calculation of the excavation involved, and we deducted where we were entitled to make a deduction for common excavation contained, or rock excavation contained, in the lateral prism or the pipe line prism going through the structure, also, on the basis of the calculation, which means that for the majority of the small structures we did not measure the excavation after it was performed. There was an understanding in advance between the contractor and our office as to what that basis for payment was to be, which was based upon the specification provisions. In certain of the larger structures, notably the one referred to in Exhibit E, the lines of that excavation were staked on the ground; but they weren't staked on the ground for all of the small lateral distribution structures.

“Mr. Olson: I move that that answer be stricken on the ground it is not responsive to the question, and on the further ground that any understanding between the contracting officer or the Bureau of

(Deposition of Harold T. Nelson.)

Reclamation and the prime contractor Macri would not in any manner be binding upon the sub-contractor, the use plaintiff."

The Court: It will be overruled, or denied, rather.

"Q. And Mr. Nelson, would your answer be the same with respect to rock excavation, as common excavation? [1675]

"A. Yes, with the following qualification: that rock excavation, the rock excavation calculation is based, however, upon field measurement as to the relative proportions of rock encountered, which cannot be disclosed until the common excavation has been removed from on top of the rock.

"Q. Can you tell me, Mr. Nelson, whether or not the basis of payment as you have indicated by your above answers was communicated to the Concrete Construction Company as sub-contractor, either orally or in writing?

"A. The basis of payment is as provided for in the specifications. However, I am quite sure that throughout the performance of the job there were numerous occasions upon which this might have been discussed among the various engineers in charge of the job and the various contractors concerned.

"Mr. Olson: I move that that answer be stricken as not responsive, and further that it is based entirely upon hearsay.

"Mr. Holman: I will consent that the answer be stricken."

(Deposition of Harold T. Nelson.)

Mr. Holman: And I join, as not responsive.

The Court: Well, all right, it will be stricken.

“Q. What I asked, Mr. Nelson, was whether or not you in your official capacity knew that the substance of what you had [1676] detailed in your previous answer was communicated to the Concrete Construction Company, as to whether they knew that or not.

“A. Yes, I personally discussed our basis of payment.

“Q. With whom?

“A. Both with Mr. Schaefer in our office and with Mr. Darcy on the job.

“Q. That would be Mr. M. C. Schaefer, this gentleman? (Indicating the use plaintiff).

“A. Yes.

“Q. And Mr. Darcy (Indicating Mr. Patrick L. Darcy)? A. Yes.

“Q. Were you on the job during the progress of the excavations for structures? Did you see the excavations for structures being performed?

“A. Yes, not a hundred per cent of the time.

“Q. Yes, but you saw a performance?

“A. I saw a representative performance, yes.

“Q. And was that in progress at the time you discussed it with these gentlemen, that you have indicated in your answer? A. Yes.

“Q. Handing you what has been marked Identification F, will you tell me whether or not that communication was sent by you in your official capacity to the addressee, as indicated? [1677]

“A. Yes, it was.

(Deposition of Harold T. Nelson.)

“Q. Will you tell me, Mr. Nelson, whether or not in the field operation on this job 1062-1 any delay in the completion of concrete structure did result in a delay in performance of the item of backfill?

“Mr. Olson: That question is objected to upon the grounds that it’s assuming a state of facts not supported by the evidence.”

The Court: Overruled.

“A. Obviously you cannot backfill a structure until the structure is in place.

“Q. Then what would be your answer in respect to this job?

“A. That the backfill could not be completed until the structures were completed.

“(Whereupon, a letter dated 6 January 1945, from the witness to Macri Company, was marked Defendants Macri’s Exhibit G for Identification.)

“Q. Handing you what has been marked Identification G, will you tell me whether or not that was an official communication transmitted by you to the addressee, as indicated?

“A. Yes, that was.

“Q. Mr. Nelson, at the time of the performance of Specification 1062-1, what was the general and national situation with respect to shortage of lumber? [1678]

“Mr. Olson: That question is objected to—

“Q. (By Mr. Holman, interposing): If you know.

(Deposition of Harold T. Nelson.)

“Mr. Olson: That question is objected to as not a proper question to be propounded to even an engineer of Mr. Nelson’s qualifications, and on the further ground that it’s immaterial, irrelevant, and incompetent under the terms of the contracts involved in this case, and specifically the sub-contract between defendant Macri Company and the use plaintiff, M. C. Schaefer.”

The Court: I’m not sure that Mr. Nelson has been qualified as an expert on lumber.

Mr. Holman: He says in the next answer he is not an expert. He tells what their experience has been.

The Court: Well, I’ll overrule the objection.

“A. I certainly am not an expert on the national lumber situation. I can say, however, that in all our experience with all our contractors on the project at that time, shortage of lumber was very pronounced on every contract.

“Mr. Olson: I move to strike the answer on the ground that it is not responsive.”

The Court: Denied.

“Q. Can you tell me whether or not there were any less restrictive requirements by the Bureau of Reclamation as to grades of lumber or moisture content of lumber, during the period covered in performance of Specification 1062-1 [1679] than previously?

“Mr. Olson: That question is objected to on the ground that it’s immaterial, irrelevant, incompetent, and that it is not a complete question in the first

(Deposition of Harold T. Nelson.)

place; furthermore, it is an attempt to vary the terms of the contract existing between Macri & Company and the use plaintiff."

The Court: Well, I'll overrule the objection.

"A. The restrictions are always as provided for in the specifications, but our enforcement of those restrictions was tempered by conditions prevailing at that time; in other words, we did not strictly enforce those provisions.

"Q. Mr. Nelson, was there ever any instances brought to your official attention of the Concrete Construction Company being out of lumber for the purpose of construction of forms for concrete structures?

"A. Mr. Darcy called to my attention many times that he was short of lumber. I do not recall of a instance where they were absolutely out of lumber.

"Q. Did you at any time have any conversation with the Mr. Patrick Darcy above identified at this deposition hearing, with respect to the shortage of lumber?

"A. I would say many of them.

"Q. And can you tell me whether or not at any time that there were any such conversations between you and Mr. Darcy [1680] with respect to the shortage of lumber, the forms in the field had been filled with concrete?

"The Witness: Would you repeat that question?

"(Pending question read).

(Deposition of Harold T. Nelson.)

“A. I can’t answer that specifically.

“Q. To your official knowledge was the work at any time stopped by the shortage of lumber?

“A. The work—I can’t say that it was stopped specifically by the shortage of lumber; there were so many interruptions.

“Q. Can you tell me whether or not there were any instances reported to you officially of the lack of structure excavation for placing forms?

“A. Yes, I do recall a period at the start of the contract in which our reports showed that the Concrete Construction Company would not undertake operations until there was sufficient structure excavation to permit them to operate uninterruptedly.

“Q. And by your report you referred to the field inspectors’ report?

“A. Yes, at the time the Concrete Construction Company was to start operations on the job.

“Q. Mr. Nelson, if the subcontractor’s, Concrete Construction Company, payroll report to and including the week of October 18, 1944, from the week of March, 1944, bears [1681] the stamp of the Bureau, ‘Received October 20, 1944,’ what does that mean?

“Mr. Olson: For the purpose of the record, I object to the question on the ground that it is wholly immaterial so far as any controversy involved in this case is concerned.”

The Court: Overruled.

“A. It indicates delayed submittal of the payroll.

(Deposition of Harold T. Nelson.)

“Q. And was that so, do you recall?

“Mr. Olson: Same objection.”

The Court: Overruled.

“A. Yes, it was so.

“Q. With reference to the copy of 13, final, of June, 1945, on Specification 1062-1, and to the item thereon, ‘Liquidated Damages, six days at \$25.00, \$150.00,’ can you explain with respect to those liquidated damages?— And I will extend my question further, Mr. Nelson: And with respect to the prior monthly estimates on which similar items show. I am interested primarily in whether or not that’s a damage item assessed according to the terms and specifications of the contract.

“A. According to the contract, for each and every day that the contract time is exceeded in the performance of the contract, it is mandatory upon us to make a deduction from the payment, of the amount stated in the specifications, [1682] which was \$25.00 per day for each day beyond the expiration date of the contract until the contract was completed and accepted by the Government, which for this contract was March 31, 1945.

“Q. Then similarly with respect to the final estimate, number 16, of October, 1945, under Specification 1068, and the prior monthly estimates, would your answer be the same for that job and those specifications?

“A. Yes, except that the amount of the damages for 1068 was \$50.00 a day.

(Deposition of Harold T. Nelson.)

“Q. And those deductions for both of the jobs indicated were made? A. Yes.

“Q. Based upon your experience, which you have previously detailed in the record, Mr. Nelson, is lumber an expendable item in performance of concrete structures?

“Mr. Olson: That question is objected to as being wholly immaterial, irrelevant so far as any issue involved in this case, not a proper question to be submitted to an engineer of even Mr. Nelson’s qualifications.”

The Court: The provision of the sub-contract here is that Mr. Macri is to furnish the lumber and it is to be his property after it is used, isn’t that correct?

Mr. Holman: Originally to furnish all the materials except the wire and steel, and then there is a provision [1683] that the lumber shall be cleaned and stacked.

The Court: Well, what is the materiality of this, whether or not it is expendable?

Mr. Holman: I had in mind this only in asking that at that time, your Honor; whether or not lumber is regarded the same as a small tool or an exhaustible item in construction, as against some item that could be used on another job.

The Court: Well, I’ll overrule the objection.

“A. Yes, I believe the specifications so recognize.

“Q. (By Mr. Holman): I will ask you, Mr. Nelson, referring again to the conversations with

(Deposition of Harold T. Nelson.)

Mr. Darcy respecting lumber, specifically whether or not you had any conversation in which his attention was called to the fact that the lumber should be used for forms to the full extent available, before complaining. In the first place, do you recall any such conversation, Mr. Nelson?

“A. I recall a series of conversations with Mr. Darcy during the late summer months, in which performance was lagging, and in which Mr. Darcy stated that his lack of performance was due to shortage of lumber; and during the same period we were very conscious of the delayed performance under this contract. I used to stop at the yard to see just what was going on. I was also aware of frequent notes on the inspectors' reports, and also verbal reports [1684] from my inspectors, quoting Mr. Darcy as stating that unless a certain amount of lumber was received by such and such a date they were going to suspend operations; and I likewise recall Mr. Darcy pointing out to me the dwindling supply of lumber and complaining of the fact that it was hampering his operations. And I would suggest to Mr. Darcy that he should absolutely run out every form, every piece of available lumber he had, and then go out with his entire crew to place concrete with absolutely no lumber left in the yard; and I pointed out that he would then have a positive proof and also a condition that would absolutely prevent him from placing any more concrete. In fact, I urged that procedure, to establish beyond dispute the fact that the lumber was not forth-

(Deposition of Harold T. Nelson.)

coming; but the lumber seemed to come in in drib-
bets, and the state of absolute exhaustion and shut-
down was not obtained so far as I could determine.

“Q. There was no official communication from
you as construction engineer to the principal con-
tractor regarding shortage of lumber, so far as you
recall?

“A. I rather expect that a review of our cor-
respondence to your office might have disclosed,
should have disclosed—should disclose reasons we
considered prime reasons for the delay. I would
have to review the entire file. I do not observe any in
these letters you showed me. A [1685] review of
the Yakima office correspondence file would disclose
our objections. We had no official relationships with
the Concrete Construction Company, as such; our
letters would have to be delivered to the principal
contractor.

“Q. Mr. Nelson, in your answer you said, ad-
dressing me, ‘your office.’ You meant the office of
the Macri Company, did you not? I am their
lawyer. A. Yes, the Macri office.

“Q. You were subpoenaed by this document
which you now hold, to appear, Mr. Nelson, were
you? A. Yes.

“Q. Mr. Nelson, paragraph 47 of Specification
1062-1, and other paragraphs, use the term ‘con-
tracting officer,’ Were you the contracting officer
for this job?

“A. No, I was not; I was the representative of
the contracting officer.

(Deposition of Harold T. Nelson.)

“Q. Who was the contracting officer?

“A. The contracting officer was the Chief Engineer, Walker E. Young, whose name was signed to the prime contract.

“Mr. Holman: You may inquire.

“Cross-Interrogatories

“By Mr. Olson:

“Q. Mr. Nelson, for the record, please state what time it is.

“A. I observe from the Western Union clock on the wall that it is approximately 4:33. [1686]

“Q. You had no official connection, I believe you said, as far as the Concrete Construction Company was concerned? A. No, sir.

“Q. And it's true, is it not, Mr. Nelson, that your field inspectors, as far as the concrete structure work was concerned, were there to determine that the completed concrete structure was in proper alignment and to proper grade and compiled with the specifications of the Bureau? A. Yes.

“Q. And how much trouble the Concrete Construction Company had in getting the hole or the excavation ready to put in the structure forms, was not a matter of concern to your office?

“A. No, it was not.

“Q. And when you figured your progress estimates on excavations and structure excavations, you paid Macri & Company as the prime contractor for the excavations, irrespective of whether or not Macri

(Deposition of Harold T. Nelson.)

& Company had done the excavating or the excavation had been done by the Concrete Construction Company? A. That is correct.

“Q. So that the fact that your progress reports on your structure excavation would indicate that at the end of a certain month or on a certain date that a certain amount of excavation had been done, that would not indicate or [1687] show who had performed that excavation? A. No.

“Q. Now, Mr. Ed Keeler was in your office at the time you were in Yakima office in charge of the Roza Division, Yakima Project? A. Yes.

“Q. And he had charge of the office in which the actual payment figures were made for excavations?

“A. As office engineer he had charge of all computation work in connection with this contract.

“Q. You indicated with reference to a certain report of April, 1945,—I think it was a concrete report—that the overrun of 14.5% would indicate the finding of your Bureau that that percentage of concrete had been poured into that particular structure, more than the design called for?

“A. No, I did not. I stated that that was the difference between the concrete through the mixer and the designed quantities. Now, that did not necessarily mean that all of the concrete that went through the mixer got into the forms. That includes all of the loss between the time the concrete leaves the mixer and gets into the forms. It could include the overage in the forms themselves,

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and it could include an item of waste that was dropped on the ground, that was adhered to the concrete buggy, spillage, [1688] and small losses in handling; but the substantial portion would be represented by the amount that the—either that the forms were in excess of the designed amount or that the subgrade could have been below grade.

“Q. If the subgrade throughout the entire floor of the structure was below grade, that would raise to a considerable extent, would it not, Mr. Nelson, the over-run of concrete in that particular structure?

“A. It would raise the over-run. I would not say to a considerable extent, without knowing the amount of the over-excavation.

“Q. Well, the more that the floor of the excavation was over-excavated, the more concrete it would take to pour that particular structure, wouldn't it?

“A. You are correct.

“Q. And that would also be true on the vertical banks against which the concrete was to be poured without an intervening form; if they were over-excavated and out of line, that also would take extra concrete, would it not? A. Yes.

“Q. And it was one of the duties of your field inspectors to inspect each of the concrete structure forms and to approve it before they permitted the Concrete Construction Company to place concrete in the forms? A. Yes. [1689]

“Q. So that if the sub-elevation was not excavated low enough, that would require, would it not,

(Deposition of Harold T. Nelson.)

Mr. Nelson, additional excavation in order to give the required thickness to the floor of the concrete structure, before your inspectors would permit the pouring of concrete in that particular structure?

“A. Yes.

“Q. It is also a fact, is it not, Mr. Nelson, that in order for the Concrete Construction Company to assemble and place its structure forms in the excavation, it was necessary that the excavation itself first be completed, so as to receive the structure forms?

“A. It's necessary that the hole be large enough to accommodate the form, yes.

“Q. And also that the sub-elevation or the sub-grades be at least low enough to permit the installation of the concrete forms for pouring concrete to the proper elevation?

“A. The subgrade would have to be correct.

“Q. And if the sub-elevation or subgrade was too low, that in each instance would require additional concrete so that the completed floor of the concrete structure was brought to the required grade as required by your grade lay-out plans?

“A. Yes, except that the field inspectors were under instructions to watch for excessive over-excavation, in which [1690] case compaction could be required, thus bringing the subgrade back to grade, in lieu of the more expensive way of filling by use of concrete.

“Q. So that if the Concrete Construction Company in placing the forms in the excavation came to a place where the subgrade was excavated so low

(Deposition of Harold T. Nelson.)

that it would leave a slab of concrete on the floor of the structure to an extent that the dimensions were considered in excess, then your inspectors were under instructions to require tamping or compaction as you term it? A. Yes.

“Q. And that again would have to be done before your field inspectors would permit the pouring of the concrete in the structures?

“A. Yes. I am not saying that that occurred; I am saying that that would be our requirement, if what you say is correct.

“Q. Do you know whether it occurred, Mr. Nelson?

“A. I can't say that I do, not being on the ground at all times.

“Q. Mr. Nelson, with reference to the drawings contained in the Specifications 1062, those drawings are typical drawings, are they not, for all Bureau of Reclamation work, and not prepared specifically for the 1062 or Job 1068?

“A. They are prepared for the type of work represented by [1691] 1062 or 1068. I would not say they were typical throughout the Bureau, but they were typical of the type of work we had in the entire Yakima Project. I would not say they were typical of the entire Bureau of Reclamation, because the type varies depending upon the method of water measurement, whether by weir or by meter gate or by partial flume.

“Q. The structure lay-out plans that you issued, however, are your specific detailed plans from which

(Deposition of Harold T. Nelson.)

that specific concrete structure was to be designed and the concrete placed on this project?

“The Witness: Would you repeat that question?”

“(Pending question read.)

“A. The lay-out structures we issued were in themselves completed designs. They were issued to facilitate the construction on the part of the contractor of the standard drawings contained in the specifications.

“Q. Then, Mr. Nelson, the plans contained on the structure lay-out plans and the elevations shown thereon are themselves the complete detail of each of the structures, from which the structures can be built?

“A. Yes, but they are subject to revision from time to time as the needs of the job may require. They are not the final—necessarily final in all cases.

“Q. And if they are revised, you would then issue a revised [1692] set or revised plan of some particular structure? A. Yes, sir.

“Q. So that they themselves are complete, then, without reference to these drawings in the specifications? A. Yes.

“Q. Now, if the restrictions contained in the specifications, with reference to the quality of lumber, were not enforced, that would cause additional trouble, would it not, to the person making the form panels, in having to use lumber of a poorer grade?

“Mr. Holman: Well, I object to that question as

(Deposition of Harold T. Nelson.)

based upon an assumption that there was any such requirement in the specifications.”

The Court: Overruled.

“A. I would say that it is more difficult to perform—or to construct forms with inferior lumber than it is with first grade lumber; but I am not an expert on form work or carpentry. But I believe that that is obvious.

“Q. You stated you recalled numerous complaints by Mr. Darcy as to the shortage of lumber in building forms on Job 1062? A. Yes.

“Q. And those complaints continued throughout the performance of the contract?

“A. They—not ‘towards the last; they were particularly acute [1693] in about the middle period of the contract. There were no such complaints when he returned to complete the turbine lateral chute and stilling pond.

“Q. That was right near the end of the project?

“A. Yes.

“Q. Now you say that you do not recall a time when the Concrete Construction Company was entirely out of lumber at the yard?

“A. No, I don’t.

“Q. And by that you mean of all types—entirely out of all types?

“A. I mean in general. It could well be that they were out of some specific type, such as two-by-fours; but I was usually aware of either a pile of lumber of the usual types or form panels that were being rebuilt for use.

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“Q. There were times, were there not, Mr. Nelson, when they were out of two-by-fours, even though they had other types of lumber, or be out of some other type of lumber when they had other type of lumber when they had other types?

“A. I can’t specifically recall. I frankly was trying to see that brought to a head. There were many threatened cases of suspension, but it seemed to me that the sure proof would be to exhaust everything, report for work with a crew and be unable to perform the work.

“Mr. Olson: I move that the last sentence of the [1694] answer be stricken, on the ground it was not responsive.

“Mr. Holman: I resist. It was solicited entirely by the question.”

The Court: I’ll grant the motion to strike as not responsive, all except “I can’t specifically recall.” That may stand.

“Q. (By Mr. Olson): It is also a fact, Mr. Nelson, is it not, that the lumber as it was delivered on the—at the yard on the project, came in in dribblets, I believe you said?

“A. Yes; I at no time saw a large supply.

“Q. Now, in the excavation of these structure holes, in addition to the rough excavation which could be done by a shovel, there had to be considerable hand excavation before the forms could be installed and the concrete poured; isn’t that true?

“A. Yes. I wouldn’t say as to relative amounts. I would say in every case there is a certain amount

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of required hand-trimming, especially in corners that cannot be reached by a machine, and in narrow head-walls, and in cut-off walls, below grade.

“Q. And in many of these excavations, particularly those that contained two or three structures, they would have sub-elevations of three to four or possibly more different elevations?

“A. Yes, the flow line of the various structures were not at [1695] a common elevation.

“Q. And those different elevations required hand excavation in order to get the relative sub-grades to the proper grade?

“A. Yes, I would say that.

“Q. And also the vertical banks against which the concrete was to be poured without the use of an intervening form, likewise had to be hand-trimmed rather than doing it with a power shovel?

“A. If that is the method elected by the contractor, that is true. However, if he over-excavates, then back-forming is required.

“Q. And that again is a hand operation?

“A. Oh, yes, the back-forming would be. For instance, in the case of a cut-off wall, which is only six inches in thickness, obviously a machine would dig a trench three or four feet—four feet wide, in order to form this six-inch wall; that would require a form wall and a considerable amount of backfill, so in some—a number of instances there are two alternates, and we have had contractors use each alternate—use both alternates, depending upon their relative costs of the work. I might say we try

(Deposition of Harold T. Nelson.)

to encourage holding the excavation of head-walls down to the minimum widths, if we could, because the backfill was objectionable to us. We preferred the [1696] natural ground to backfill, if it were possible to obtain.

“Q. What your office, what the Bureau, was concerned with primarily, throughout the entire performance of 1062, was to get the work completed and the concrete structures poured and the forms removed, rather than who was at fault for not getting them done; isn’t that true?

“A. That is correct. We were interested in performance of that contract within the contract performance time.

“Mr. Olson: That’s all.

“Redirect Interrogatories

“By Mr. Holman:

“Q. Mr. Nelson, in measuring for pay quantity on Specification 1062-1, was complete compliance with the measurements as indicated on the structure lay-out drawings required, as against the complete adaptability of the structure to the purpose of the project?

“Mr. Olson: Objected to as not being proper redirect examination.”

The Court: Overruled.

“A. We insisted upon full compliance to the lines and grades insofar as they might affect the hydraulic properties of the structure. However, we

(Deposition of Harold T. Nelson.)

did encourage the carpenter foremen of our various contracts to standardize if it was possible, possible for them to do so. Our set of lay-out drawings represented the structures as we desired to have them built; but it was our experience that various contractors [1697] had various methods of paneling structures so that panels could be used interchangeably from one structure to another by slightly altering our design sometimes, particularly heights of head-walls or thickness, where stability of the structure was not affected; sometimes we could accomplish standardization with improved efficiency. And we always were willing to make small alterations in the interest of standardization or increased efficiency. And we found it undesirable to consider those lay-out drawings as too rigid, except insofar as hydraulic properties were concerned, because different contractors had different ideas as to how they were going to perform this construction.

“Q. Mr. Nelson, in the performance of the concrete structures, was wire permitted to be used?

“Mr. Olson: Now I am going to object to that as an attempt to vary the specifications.

“Mr. Holman: I will withdraw the question, then.

“Q. (By Mr. Holman): Did the Bureau require of the principal contractor or the subcontractor on Specification 1062 the use of she-bolts?

“(Pending question read.)

“Mr. Olson: No objection, if he knows.

(Deposition of Harold T. Nelson.)

“A. She-bolts were not required. By reference to the specifications you will see that any patent form tie may be [1698] used, providing the imbedded part of the form tie is removed for a specific distance below the surface of the concrete; and we have had any number of patent form ties used in lieu of she-bolts. You will find that our requirement is that the forms be supported in such a way that they are rigid and capable of holding the concrete under vibration. And I might also add that the majority have used she-bolts for that purpose, but some of them have not.

“Recross Interrogatories

“By Mr. Olson:

“Q. Well, it is a fact that in this particular case, on 1062, your field inspectors did require it, isn't it, Mr. Nelson?

“A. Not to my knowledge. The contractor could have—or, there could have been a protest on that. We require that the forms be supported in the manner as stated in the specifications.

“Q. Then, Mr. Nelson, do I understand from your answer to Mr. Holman's question, the use of she-bolts is a generally used and accepted practice of holding forms in place and rigid for receiving concrete? A. Yes.

“Q. And would you say that it is a preferred method with the Bureau of Reclamation, in holding concrete structure forms in place? [1699]

(Deposition of Harold T. Nelson.)

“Mr. Holman: That’s objected to as outside of the issues, and calling for a statement from the Bureau representative upon a subject covered by the specifications themselves.”

The Court: Overruled.

“A. I would say that the Bureau’s position is covered by the specifications; but personally, I like to see she-bolts on a job.

“Mr. Holman: I move that the latter portion of that answer be stricken as not responsive, and as wholly immaterial and outside of the issues.”

The Court: Denied.

“Q. As engineer in charge of this project 1062 and in charge of the Roza Division office of the Yakima Project, that is your personal preference, that the use of she-bolts be employed in the holding of concrete structure forms in place?

“Mr. Holman: I object to that question as prolix and improper and having been already answered.”

The Court: Overruled.

“A. I consider them the most reliable.”

(End of deposition.)

Mr. Holman: And then there is a Reporter’s Certificate and a Notarial Certificate, which I will not read. I respectfully ask that the deposition as published be [1700] filed, and the contents as read be incorporated in the reporter’s record.

The Court: I think that may be a little premature, Mr. Holman, until we have a ruling on the attached exhibits.

Mr. Holman: That may be, your Honor. I didn't want to forget that. I would like to offer in evidence from Macri's identification 17, with the request to the Clerk that a copy be supplied in lieu of the copy contained in such identification, the letter of May 21, 1945, from Yakima, Washington, from the Concrete Engineer to the Construction Engineer, and specifically with reference therein to specification 1062, schedule number 1, the last sentence of which, reading "Over-run for concrete structure on this job was 14.5%" is referred to in Mr. Nelson's deposition, although tied to the wrong month, and I would like similarly to offer as so identified by Mr. Nelson——

The Court: What was that first one?

Mr. Holman: May 21, 1945. It is the report, apparently, for the month of April, but it is dated May 21, 1945.

The Clerk: I will designate that as identification 17-a.

(Whereupon, letter Concrete [1701] Engineer to Construction Engineer, dated May 21, 1945, was marked Defendant Macri's Exhibit No. 17-a for identification.)

The Court: This whole group of documents there is marked as defendant Macri's Identification 17?

Mr. Holman: Yes, your Honor.

The Court: Now you're offering just portions of it?

Mr. Holman: Just the one letter. It runs, your

Honor, as late as February 6, 1947, and it starts as early as 1941.

The Court: Yes——

Mr. Holman: This 17 does; and I would like similarly to offer the letter of May 22, 1944; that would be 17-b, particularly the reference therein to specification 1062.

(Whereupon, letter Concrete Engineer to Construction Engineer, dated May 22, 1944, was marked Defendant Macri's Exhibit No. 17-b for identification.)

Mr. Olson: Are you offering the second paragraph?

Mr. Holman: I'm offering the communication, including the paragraph. I will be glad to restrict it to the paragraph, if you prefer, counsel, merely showing the head of the letter and the address and then the particular [1702] paragraph.

Mr. Olson: Well, your Honor, we object to the offer of 17-a on the grounds that it's not admissible; it purports to be a letter from the Concrete Engineer to the Construction Engineer, in which the over-run of a certain structure is purported to be 14.5%, referred to in the deposition. It seems to me that is obviously not admissible. What right of cross-examination do we have to determine the cause of that over-run? As explained by Mr. Nelson in his testimony that over-run could result from any number of things, possibly from the defendants' own negligence; most likely because of improper excavation. Now, that being the situation, your

Honor, and nothing here to show what did cause the over-run, certainly it's not admissible. If the concrete inspector can remember and could get on the stand and testify that that was our fault, then we could cross-examine him about it and ask him about it, but to put this letter from the Concrete Engineer to the Construction Engineer into evidence, your Honor, I suppose counsel intends to indicate and argue that we were at fault some way, and if that is it, your Honor, you can readily see that we don't have any opportunity to examine, except insofar as I did indirectly with Mr. Nelson as to the various possibilities that might bring that about. [1703]

The Court: This I understand is a letter, an inter-bureau communication, from one agent or official of the bureau to another?

Mr. Holman: From the Concrete Engineer to the Construction Engineer.

The Court: A letter?

Mr. Holman: An official communication; I'd say it is not a letter; it's a report, your Honor.

The Court: Well, let's see it; maybe I can tell more about it.

Mr. Holman: Looks to me as if it's drawn in the regular form.

Mr. Olson: Further objected to on the ground that it's wholly hearsay as far as this trial is concerned, as far as the plaintiff is concerned.

Mr. Holman: I want to submit, your Honor, that that's part of the official records of the government, and so identified by Mr. Pease here, and it

was so submitted by Mr. Pease. In other words, it's not the same as an inter-office correspondence, an inter-office report, and as I told your Honor, that particular 17 runs from 1941 complete to 1947; these are the ones indicated currently in this period. There's nothing that any of the parties could do one way or the other that could make it any different or change that factual record; that's [1704] what it is, a factual record from the government's viewpoint.

The Court: Well, it seems to me that we have to draw the line somewhere on what is and what is not admissible on these documents which are connected in some way with the Bureau of Reclamation. My view of it would be that the official entries or records made and kept in due course and progress of its work, and customarily made and used by the Bureau of Reclamation, where they pertain to this work and are otherwise material, would be admissible.

Mr. Holman: Those are, your Honor.

The Court: What is that?

Mr. Holman: Those are; they're the report from one officer to the other officer. That's what they say.

The Court: Well, I'll overrule the objection and admit that paragraph that pertains to 1062.

(Whereupon, Defendant Macri's Exhibit No. 17-a for identification was admitted in evidence.)

Mr. Holman: Then, Mr. Clerk, may I change my instructions and may I ask the clerk, please,

to indicate the heading and the date, and then asterisks, and then the particular paragraph pertaining to 1062.

The Court: I might say that so far as this Court is concerned, matters of that kind would not be construed to have very much probative value unless they're tied in [1705] or identified or corroborated by other evidence. As Mr. Olson has pointed out, this communication doesn't show the cause of over-run, and it is of very little significance, it seems to me, unless it is explained or the fault laid by other evidence.

Mr. Holman: I understand, your Honor. Did your Honor rule similarly with respect to the paragraph of May 22, 1944, which Mr. LaFramboise has marked 17-b?

The Court: I haven't seen it.

Mr. Olson: I haven't either, your Honor. I haven't read it. I could, in just a minute.

The Court: All right. I might say, there is a reference in Mr. Nelson's deposition to an over-run, which seems to be this one, although there is a discrepancy in dates. It does tie it in with the testimony.

Mr. Holman: Your Honor, his answer was upon the same words which are in this.

The Court: Same percentage of over-run, you mean?

Mr. Holman: I quoted the wording of this, but I had the—it is a letter, apparently, for the month of April, and issued in May.

Mr. Olson: Well, I make the same objection,

your Honor. It puts the use plaintiff in a position where we're just helpless to interrogate or inquire about those matters. There isn't anything that I can see that [1706] gives any particular standing to a document because it happens to be a letter because it happens to be written in the Bureau of Reclamation. Counsel refers to it as an official document, but there is no more standing to that than a letter that Mr. Darcy might have written to Mr. Schaefer. We've got a lot of them I would like to put in evidence, being factual claims out there on the job.

Mr. Holman: I do not make any such claim. The witness Harold Pease made the statement that they are official communications.

Mr. Olson: Well, those would be official communications as far as the Concrete Construction Company is concerned. For example, he's got "Excavations well ahead." Does that mean the fine grading is done? Every one of the inspectors told us they didn't pay any attention to the fine grading; the thing they were concerned with is whether the structure was right before the concrete was poured.

The Court: Who is the author of this communication; Curtis L. Tyler; he has not been called, or have you taken his deposition?

Mr. Holman: No, sir. If I have time I'll take his deposition. He's somewhere in the East.

The Court: Well, you probably won't have time to [1707] take any more depositions. I'll sustain the objection to this. It seems to me manifestly

unfair to bring in evidence which is not subject to interrogation. That's 17-b, rejected.

(Whereupon, Defendant Macri's Exhibit No. 17-b for identification was Rejected.)

The Court: Well, it's time for the noon recess.

Mr. Holman: Your Honor, and counsel, before recess if I may make this observation and request. Mr. Black has again returned as notified by the Clerk. He's in the same excruciating position with respect to his power line, and I would like very much to relieve him and let him go, and similarly, there is Mr. Bjorth, from Seattle, who was called in connection with the signing of the contract, and who is an estimator. I would like, if I may, to call him this afternoon.

Mr. Olson: My only position, your Honor, is I would like to have counsel maintain some semblance of continuity. I don't see, after going through this deposition, what possible reason there was for interrupting Mr. Macri's testimony by reading that deposition. I do, however, want to accommodate Mr. Black, and I know the position he's in, and I'll be glad to consent to it.

The Court: That is as to Mr. Black.

Mr. Holman: Mr. Bjorth is a factual witness on [1708] the matter of signing the contract.

The Court: I know the situation with respect to Mr. Black. I think he should be permitted to testify and go as soon as possible, but we're getting this matter badly mixed up, it seems to me. We'll have to come back to the admissibility of these

letters attached to the deposition, then we've got Mr. Macri in the air here, and have to try to remember what he's testified, for the purpose of cross-examination. Mr. Black, and then I think we should finish with Mr. Macri.

Mr. Olson: Well, I'd like to accommodate Mr. Black.

The Court: Well, I say, with the exception of Mr. Black, I think we should try to go in order.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Thursday, March 13, 1947
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may I call Mr. Black to the stand?

The Court: Yes.

Mr. Holman: Or does your Honor prefer to rule on those letters first?

The Court: Well, we may as well have him testify [1709] if you have him ready.

JAMES A. BLACK

recalled as a witness on behalf of the defendants Macri, testified as follows:

Direct Examination

By Mr. Holman:

Q. You are the Mr. James A. Black who was previously subpoenaed as a witness for the defendants, and who testified at the direction of the plaintiff in his case in chief? A. Yes.

Q. Mr. Black, would you state into the record your qualifications with respect to experience on fine grading of structures for concrete, of excavations for concrete structures on reclamation projects?

A. I fine graded at Zillah, I don't know the project number, from about the first of March until about the middle of July, 1944, and I fine graded on 1062 from about the 21st of November, 1944, until January 31, 1945, and from that date on project number 1068 I fine graded the structures, all the structures on that project, finishing up about the middle of October, 1945. I went from there to project 1111, the last project of the Roza Division, near Benton City. I fine graded all the structures on that from the period of February 1, 1946, to about August 1, 1946.

Q. Now, what has been your general experience in construction [1710] work, Mr. Black?

A. I started out on construction work in 1917 for the United States Reclamation Service. I

(Testimony of James A. Black.)

followed that until about 1922, and that was also irrigation work, surveying and laying out laterals and structures. I left at that time and went farming until 1934, when I went to work for the—it was either 1933 or 1934, I can't be definite on the date, for the United States Army Engineers at Fort Peck, Montana. I stayed there until the tunnel section was through, I believe it was 1936, I believe, and I followed power line construction from that time on until——

Q. Well, may I interrupt, Mr. Black? Roughly, then, since 1917, except for a period that you were farming? How long was that?

A. That was about ten years, roughly.

Q. Except for that your work has been in construction? A. Yes.

Q. Now, you went on to 1062 when?

A. About November 21, 1944.

Q. And I believe you said you stayed on 1062 until when?

A. On 1062 I stayed until about January 31, 1945.

Q. And what was your capacity on 1062? What were you doing? A. Well, I——

Q. Let me ask it this way. Will you state whether or not you had charge of the fine grading on 1062? [1711]

A. Yes.

Q. Can you tell me anything with respect to any revisions made by the government on lateral 63.2 at or about the time you began fine grading?

(Testimony of James A. Black.)

Mr. Olson: May I have that question?

(Whereupon, the reporter read the last previous question.)

A. That was a revision. It was originally designed for an open lateral, that is, the lower end of the lateral was designed for an open lateral, and it was changed over to a pipe line, instead. The open lateral was discontinued, although it had been dug, and there was a change in the structures on that lateral.

Q. Now, did you do any digging on account of that change? A. Yes.

Q. How was that handled, by machine or by hand? A. By hand.

Q. And was there a reason for that?

A. Well, it was, as I recall it, at least one of the structures was a rock, entirely, it was a rock hole; the machine couldn't dig that.

Q. What did you say, a rock hole?

A. Yes, a rock hole.

Q. Now, do you recall whether or not you went back on lateral west turbine 2.0 and put in some structures there [1712] by hand, again on government revision; do you recall that?

A. Yes, I did, I'm pretty sure.

Q. Where did you start fine grading on 1062, do you remember, Mr. Black, what lateral?

A. I believe it was on lateral 66.6, if I'm not mistaken.

Q. Lateral 66.6?

A. I believe so. I'm not just positive of that.

(Testimony of James A. Black.)

Q. Can you tell me what was the condition on lateral 59.3 at the time you started work in November, 1944? A. No, sir, I cannot.

Q. Well, can you tell me whether or not work had been done pretty well up to the place you started, or not? I refer to forms, and to pouring of concrete? A. With few exceptions, yes.

Q. Now, handing you Exhibit 12, I was wondering if you could more nearly identify yourself with respect to the lateral—or just a minute, on defendant Macri's Exhibit 75. Have you got 1062? You have. Can you from that identify the lateral that you started to work on?

A. I'm almost positive it was 66.6.

Q. Did you currently make diary entries, Mr. Black? A. No, not on 1062.

Q. Then from the place that you began, will you tell me what fine grading you did with respect to the end of the project? [1713]

A. I believe that I fine graded between 145 and 150 structures on 1062.

Q. Well, would that be to the end of the project, or not? A. Yes.

Q. In other words, did you fine grade to the end of the project?

A. Yes; there were some few structures—

Q. Mr. Black, I would like to ask you whether or not in each instance of performing fine grading that you did perform, you did your level best to comply with the grades and the stakes as fixed for your guidance?

Mr. Olson: Just a minute; I object to the ques-

(Testimony of James A. Black.)

tion on the ground it is leading and suggestive, and the further ground it is immaterial.

The Court: The question is leading. The objection is sustained. The question is the manner in which he did it.

Q. That's right, your Honor, but obviously if I asked him now—for the purpose of the record, will you state how you performed your work?

A. Well, I done my level best to get it on line with the government reference stakes, and on grade according to their elevation given on reference hubs. Due to the frozen condition of the ground, why, it was impossible to do a neat job at that time. [1714]

Q. Now, what was the condition of the surrounding soil itself?

A. You mean the type of soil?

Q. Yes, at that time—well, give me the types of soil and what was the condition at that time. What type of soil was it, in the first place?

A. Well, it was various types of soil. Some of it was clay, some of it was sand, and I believe what they call volcanic ash, and there was considerable rock.

Q. And you spoke of “at that time.” Now, to what do you refer with respect to the time, what's the effect of that?

A. Well, it was during the part of the year that the ground was partly frozen, or frozen to the extent of five or six inches.

Q. And did that make the work more or less difficult?

A. Pardon?

(Testimony of James A. Black.)

Q. Did that make the work more or less difficult?

A. It made it a little more difficult.

Q. I believe you testified in the plaintiff's case in chief that you recalled an occasion where the crew waited while you completed fine grading. Do you recall that?

A. Yes.

Q. Can you tell me where that structure was?

A. I could show you on the map.

Q. On Exhibit 12—oh, pardon me, Exhibit 75.

A. It was on lateral 68.3.

Q. Then with reference to 12 could you identify the structure?

A. Yes.

Q. What hole or structure?

A. Pardon?

Q. What hole or structure was it?

A. Well, it's not marked on here.

Q. Handing you 12, can you identify that?

A. There is a revision sheet on that that I don't find in here.

Q. A revision sheet; well, if you can't recall it, that's all right.

A. I don't seem to find that revision sheet in here that that structure was on. It should have been the structure ahead of 287.

Q. That would be on what lateral?

A. On lateral 68.3.

Q. And what page?

A. I don't know; this is 44. It should have been the structure ahead of this.

Q. You say ahead of this?

A. Yes; this is taken off the pipe line.

Q. When you say "this," you're referring to——

(Testimony of James A. Black.)

A. Structure 285 revised, 286, and 287.

The Court: I think the witness had better find it if [1716] he can, and then testify as to what it is. All this running commentary is going to be of no value in the record.

A. Sir, I can't find that structure in here.

Q. You can't find it? It was on lateral 68.3?

A. I'm pretty sure it was, yes.

Q. What crew was it that waited, the Concrete Construction crew?

A. Well, there was two carpenters.

Q. Two carpenters, and how long did they wait while you were doing that work?

A. About two days and a half.

Q. Now, during that time, were they performing any other constructive function in the vicinity at all, or did they just wait?

A. No, they just waited; they assembled their forms and laid them out.

Q. Sir? A. They laid out their forms.

Q. Were there other structures at the time excavated and fine graded that would have been available for forms, to your knowledge?

A. I can't remember that.

Q. You can't remember that, sir; so that would be 16 hours of waiting—how many hours of waiting would it be? A. Pardon? [1717]

Q. How many hours did they wait?

A. About 20 hours.

Q. 20 hours total, you mean? A. Yes.

Q. Per man, for the two carpenters?

A. Oh, 20 hours per man, yes.

(Testimony of James A. Black.)

Q. That would be about 40 hours of waiting altogether? A. Yes.

Q. And they did not participate in that work, they just waited, is that correct? A. Yes.

Q. Will you tell me whether or not in any instance that request was made upon you to return for fine grading, if you did it; request by the Concrete Construction Company?

A. I was asked to go back and check up and finish two or three structures, or several structures, I wouldn't say two or three; several structures.

Q. Well, did you do it, sir?

A. In every instance when it was possible for me to do it I did it.

Q. And would you estimate to me approximately the total number of structures that you were called upon to come back and excavate, by the Concrete Construction Company?

A. Well, that's pretty hard to do. 10 or 12, anyway.

Q. Ordinarily, about how much time would it take you and any [1718] of your assistants to fine grade for a structure?

A. That varied a good deal. It depended on how close the hoe had roughed out the structure. Sometimes we could fine grade a structure in two hours, and other times it would take all day.

Q. That would be yourself alone, or yourself and crew?

A. Myself and crew; I usually just used two men to a structure.

(Testimony of James A. Black.)

Q. In other words, it would be Mr. Black and two men? A. Yes.

Q. And your estimate was on that basis?

A. Yes.

Q. Can you from the lay-out book, Exhibit 12, indicate any work on the east turbine where the fine grading was done by Concrete Construction Company forces?

A. Yes, I believe that there was two on there that they completed.

Q. Could you locate those, Mr. Black?

A. I believe I can.

Q. If you will do that, please.

A. To the best of my knowledge they completed fine grading on 451B, 451A, 451R, 453B, 453A, and 453R.

Q. Was that a nest of structures there?

A. It's two separate structures.

Q. And can you tell me the amount of time that the Concrete [1719] Construction Company men did expend on that fine grading?

A. No, I wasn't there; I couldn't tell you.

Q. Can you tell me why that was fine graded by them instead of you?

A. I was short of help, for one thing, and I was quite a considerable distance away, as I recall it.

Q. Was any request made for you to return and do that, or not?

A. I believe I was asked by one of the carpenters that I met on the road. He told me that the structure wasn't right.

(Testimony of James A. Black.)

Q. Well, was any request made upon you by Mr. Darcy? A. I don't believe so.

Q. Yes, sir; now, I'll ask you whether or not requests were made upon you for any fine grading, and when you checked it if you found always that it was required?

A. There was one or two instances where I found that it wasn't required.

Q. Did you find the reason it was not required?

A. Well, in one condition I know of, the carpenters kind of got mixed up.

Q. Will you explain that, how they got mixed up, what it was?

Mr. Olson: I ask that last answer be stricken, your Honor, as not being responsive. [1720]

Mr. Holman: I asked him the cause, your Honor.

Mr. Olson: He said the carpenters got mixed up. I don't know what that means.

Mr. Holman: I've asked for explanation.

The Court: Well, I'll deny the motion. He can explain.

A. Well, I believe, if I recall right, that their structure lay-out print was either muddy or something; they misunderstood the elevations on it, as near as I can remember.

Mr. Olson: You say it was muddy?

A. Muddy, yes.

Q. The print was muddy. Did you have anything to do with the lumber at all, Mr. Black, with the lumber? A. No.

(Testimony of James A. Black.)

Q. Have you any independent recollection at this time as to the lumber condition there?

A. I do not, no.

Q. Was any complaint ever made to you about any lumber? A. No.

Q. Now, in your fine grade excavation, you were thrown in contact with the—will you state whether or not you were thrown in contact with the carpenter crew in the field setting up forms?

A. A few times, yes. [1721]

Q. Directing your attention to plaintiff's Exhibit 23, after removing the model, I'll ask you if in all of your experience you have seen any structure excavation of that type with respect to slopes?

A. Not that neat, no.

Q. Have you seen any structure excavation of that type of slope?

Mr. Olson: That's objected to as being immaterial, if the Court please, if he's seen one of that slope.

The Court: I can't see the materiality of that. I'll sustain the objection.

Q. Mr. Black, can you tell me with respect to any excavations that you were on, what was the distance out that you fine graded from the neat line of the concrete structure?

A. They were always staked one foot.

Q. Well, that answer is not exactly responsive; I asked what you did. How did you fine grade?

A. You mean distance out?

Q. Yes, sir. Did you fine grade to that, sir?

(Testimony of James A. Black.)

A. I tried to make it one foot.

Q. Yes, sir. At any time, Mr. Black, was any writing or notice with respect to excavation furnished you by any member of the Concrete Construction Company crew? A. No. [1722]

Q. No notice of any kind; was any tabulation of any claimed work performed in excavation, fine grading, or otherwise, furnished you from any of the Concrete Construction Company crew?

A. No.

Q. Referring to specification 1068, Mr. Black, would you indicate from these documents and maps that I hand you what ones you used in your work on 1068?

A. On 1068, you mean the structure lay-out plan?

Q. Yes, sir; what ones you used.

A. These.

Q. When you say "these," the ones you hold now? A. Yes.

Q. I would like to get them in the order that you have them now.

A. I have referred to these. That's my daily report.

Mr. Holman: May I have the daily report marked as the first identification, and then the other two?

(Whereupon, Black's Daily foreman report was marked Defendant Macri's Exhibit No. 80 for identification.)

(Testimony of James A. Black.)

(Whereupon, Structure lay-out on Specification 1068 was marked Defendant Macri's Exhibit No. 81 for identification.

(Whereupon, Structure lay-out on Specification 1068 was marked Defendant Macri's Exhibit No. 82 for identification.) [1723]

Q. Now, handing you what has been marked Macri's identifications 80, 81 and 82, those are the three compilations or documents that you indicated from the stand? A. Yes.

Q. 80 is what?

A. 80 is my daily foreman's report.

Q. And did you keep a daily form report throughout the job, 1062?

A. I did—not 1062.

The Court: This is 1068.

Q. I'm sorry, 1068? A. 1068, yes.

Q. Does 80 carry that report that you kept, identification 80? A. Yes.

Mr. Holman: I offer that in evidence, your Honor.

The Court: Let counsel see it.

Mr. Holman: Yes, and I also offer identifications 81 and 82.

The Court: What are they?

Mr. Holman: Oh, thank you——

Q. What is 81 and 82?

A. They're structure lay-out plans.

Q. Now, will you tell me whether or not identifications 81 and 82 for specification 1068 carried

(Testimony of James A. Black.)

the same functions for that work as Exhibit 12 for specification 1062, [1724] schedule 1?

A. That's exactly the same.

Mr. Olson: Your Honor, this is kind of a bulky document to look over. As I understand it, Mr. Black, this Macri's identification 80, entitled "Daily foreman report," is a report that you made to Mr. Macri, did you?

Witness: Well, yes; it was kept in the office all the time, our field office.

Mr. Olson: But it is a report made from you to Mr. Macri's field office? A. Yes.

Mr. Olson: Your Honor, it seems to me that certainly is not admissible as having any connection with any claim against Concrete Construction Company, or as any defense to the Concrete Construction Company's suit against Macri.

The Court: What is the purpose of this?

Mr. Holman: The purpose of this is just the converse of what counsel indicates. The cross-complaint of Macri against the Concrete Construction Company is for the loss sustained by reason of their not performing that contract, and this is the daily report record of the work done in completing the structures.

The Court: Well, as I understand it, on 1068 there's no question that Concrete Construction Company [1725] did not perform——

Mr. Holman: That's correct.

The Court: ——any part of it——

Mr. Holman: That's correct.

(Testimony of James A. Black.)

The Court: —and that Macri performed all of it?

Mr. Holman: That's correct.

The Court: Then the only question there, it seems to me, would be whose fault it was that the Concrete Construction Company didn't perform, and what was Macri's cost in doing it.

Mr. Holman: That is correct.

The Court: How does that bear on this?

Mr. Holman: I had in mind, your Honor, in view of the fact that Mr. Black, he's to be allowed to go, I will have them identified and withhold the offer and leave them available for counsel. That might be more satisfactory, because I appreciate he's had no chance to see it.

The Court: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. What were the excavation operations and the hand grading operations on 1068, Mr. Black?

A. With the exception of the first lateral, I staked out roughly, staked out all of the structures ahead of the hoe so they could be roughly dug out by machine excavation. [1726] The first lateral, the hoe was too far away, I had to dig those all out by hand, but with that exception all the rest of the job it was roughed out by the back hoe and finished by hand.

Q. Yes, sir. I'll ask you whether or not you did

(Testimony of James A. Black.)

the same type of fine grading, excavation finishing, with respect to 1068 that you did on 1062?

A. I had the structures roughed out a little larger with the back hoe, being more convenient to work in for ourselves and everybody else.

Q. Did you do the fine grading to the same exactitude, or differently, than you did on 1062?

A. The same type of fine grading.

Q. Now, you spoke of digging by hand because the hoe was away. Where was the hoe, do you remember?

A. If I recall right, it was on the lower end of the east turbine, about four or five miles away at the time.

Q. Can you tell me whether or not from your experience the cost of returning the hoe, that you say you dug by hand, would have been more or less than a hand excavation, as a cost item?

Mr. Olson: That's objected to as being immaterial.

Mr. Holman: It goes to our costs, your Honor.

The Court: On 1068?

Mr. Holman: I assume we have to show our costs. [1727]

Mr. Olson: I don't understand the question on 1068 is the question of what it cost Maeri. Maybe it cost him fifteen times what it should have cost him. The question is, if it should be determined that the Concrete Construction Company was at fault in not performing 1068, then it isn't what Maeri's cost is; it is what it should have reasonably cost to do that job, it seems to me.

(Testimony of James A. Black.)

The Court: Yes, I think that's true. It is a question of whether it reasonably should have cost more than the amount of the bid.

Mr. Olson: That's why we introduced testimony, among other things, that the bid was right. Remember Mr. Bufton testified that a reasonable, capable contractor could have made \$7900.00. I don't think that's binding upon Mr. Holman. He can introduce testimony if he's got it, but to go into whether or not Mr. Macri had his hoe down there two or three miles, without excavating structures, and then ask whether it is cheaper to bring it back, that is the question I'm objecting to.

Mr. Holman: I'll withdraw the question, your Honor, in view of counsel's statement, and I don't care to argue 1062 in respect to 1068 case.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give the Court, please, to the best of your recollection, the conditions on both 1062 and 1068 with [1728] respect to sloughing of excavated quantities into the holes, after they had been dug, after they had been fine graded?

A. Well, on the—I'd say the lower south part of the job was sandy, and that would slough very bad.

Q. That's which, 1062 or 1068?

A. On both 1062, the last of 1062, and through 1068.

(Testimony of James A. Black.)

Q. Now, would that be the last of 1062 and the first of 1068, or not?

A. Yes, the last of 1062, below east turbine, and through 1068 below east turbine lateral.

Q. And what with respect to sand blowing on both of these jobs, after there had been excavation and fine grading? Did that occur?

A. It did on 1068 while I was there. It didn't blow any on 1062 that I recall.

Q. It did not on 1062?

A. Not while I was there.

Q. And you were on there, I believe you said, from November to January? A. Yes.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. You went on 1062, Mr. Black, in November of 1944? A. Yes. [1729]

Q. And you fine graded, then, on 1062 until about January 31? A. Yes, about that date.

Q. Then you transferred to 1068?

A. Yes.

Q. Now, you say—did you do any fine grading on the stilling pool?

A. On the stilling pool? No.

Mr. Holman: Just a minute; which contract, counsel?

Mr. Olson: On 1062.

A. Not on the stilling pool itself.

(Testimony of James A. Black.)

Q. (By Mr. Olson): So that was done after you had left the job, then? A. Yes.

Q. So you weren't on 1062, then, clear until the end of the project? A. No.

Q. When you left there was still more excavation work and more fine grading to be done?

A. I had most all of the small structures fine graded at the time I left, with the exception of the stilling pool and the spillway.

Q. That was quite a sizeable project, wasn't it?

Mr. Holman: Just a minute. Your Honor, I think the witness has shown by his answer that he didn't grade it, and therefore it is not proper cross-examination. If [1730] he knows, why, it is all right.

Q. (By Mr. Olson): Do you know about it, the stilling pool? Did you see it? A. Yes.

Q. And the chute, I think they call it?

A. Yes.

Q. You saw that? A. Yes, I did.

Q. That's quite a sizeable project, isn't it?

A. Yes.

Q. Do you know about how long that chute was?

Mr. Holman: I still submit it is not proper cross-examination, your Honor.

The Court: If he knows about it, I think he can answer.

A. As I recall, it is about 1800 feet long.

Q. About 1800 feet long, and the stilling pool, is that located at the bottom? A. Yes.

Q. Of the chute? A. Yes.

(Testimony of James A. Black.)

Q. Can you give any approximate dimensions of that?

Mr. Holman: Same objection to all this, your Honor. It is not proper cross-examination.

The Court: The record may show the same objection. [1731]

A. No, I can't; I've forgotten.

Q. Now, you say that you fine graded to the best of your ability, but it was impossible to do a good job at that time; that's because it was in the winter, is it not, Mr. Black? A. Yes.

Mr. Holman: Just a minute. Your Honor, I object to the question as not entirely what the witness stated. Counsel put elements in that question that the witness didn't state. He said it was more difficult. I don't think the witness stated he didn't do a good job.

The Court: I'll overrule the objection. He can correct it if it doesn't represent what he testified.

(Whereupon, the reporter read the last previous question.)

A. Yes, the ground was frozen. It wasn't frozen deep enough so you could really get down and dig it. It was frozen about five inches. In most instances if you would dig the frozen ground off, take it all off, why, the structure would be too deep, so you just had to take it off in layers, and it was just impossible to do a neat job.

Q. In other words, it was just impossible to make the right elevation or sub-grades?

(Testimony of James A. Black.)

A. Without spending too much time on it, yes.

Q. And Mr. Maceri told you not to spend too much time? [1732]

Mr. Holman: I submit that is not proper cross examination, your Honor. If he wants to make this his witness again——

The Court: I think it pertains to the manner of doing the work. I'll overrule the objection.

Q. (By Mr. Olson): And Mr. Maceri had told you repeatedly not to take too much time in fine grading, had he not?

Mr. Holman: The same objection, your Honor. In other words, counsel in his cross-examination is not referring to any of the testimony of this gentleman on direct, at all. There was no single question, your Honor, asked this gentleman about any instructions.

The Court: You attempted to elicit from this witness that he had done this work as good as possible under the circumstances. This goes to whether he did or not. I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

A. Yes, he told me to not spend too much time, that we had to get the work done.

Q. And he also told you not to be too particular with the fine grading?

A. Well, he told me to get it down close, within possibly two or three tenths, anyway.

Q. Now, it's also a fact, is it not, Mr. Black, that

(Testimony of James A. Black.)

you [1733] just didn't have enough men to help you and get this fine grading done right, too, isn't it?

A. There was times when I didn't have enough help. Other times I had help.

Q. And it took two men and yourself from two hours to a day per structure to do the hand excavations? A. Yes.

Q. And you had—how many men did you have with you?

Mr. Holman: Your Honor, I object to this as cross-examination for the reason that plaintiff now is again going into the same proofs that he endeavored to make by this witness when he made him his witness.

The Court: Well, it would still be a question of whether it is proper cross-examination, wouldn't it? You asked him how many men he had with him, and he said two. He testified to that, didn't he?

Mr. Holman: Yes, as to one function in the incident of time, he said himself and two men.

The Court: Overrule the objection.

A. I had all the way from one to five men. I never used more than two in any one structure. Sometimes I'd have them working in three structures all at the same time.

Q. Sometimes you did what?

A. I had them working in three different structures at one time, if I had the men. [1734]

Q. Would those structures be in the same excavation? A. No, different excavations.

Q. Different excavations. Now, you say you can

(Testimony of James A. Black.)

remember some instances when the carpenters or Mr. Darcy requested you to go back and do some sub-grading, I believe you said the carpenters, and you didn't go because you were too far away and didn't have help?

A. I was short of help, yes.

Q. And you didn't have the man-power to go back and do the excavation?

A. Not at that time.

Q. You don't know, Mr. Black, I assume, if you were out ahead, how much hand excavation the carpenters themselves did in these excavations?

A. No, I don't.

Q. Now, with reference to Exhibit 23, plaintiff's Exhibit 23, you say that you never saw an excavation which was that neat?

A. No, I haven't,

Q. You think Mr. Darcy did a good job of making that?

A. Yes, I think he did.

Mr. Holman: I object to that question, your Honor, and move the answer be stricken.

The Court: Sustain the objection. I think it is immaterial. [1735]

Q. (By Mr. Olson): Now, you staked out the holes or the stations or locations of excavations on 1068?

A. I did, yes.

Q. And how much lateral clearance did you give on 1068?

A. For the hoe I gave for rough excavation two feet.

Q. Two feet from what?

A. From the concrete line.

(Testimony of James A. Black.)

Q. That's just twice as much as you were giving on 1062?

Mr. Holman: Objected to as argumentative, your Honor.

The Court: Yes, I'll sustain the objection.

Q. Well, on 1062 you gave how much, then?

A. My work was all hand excavation there.

Q. Matter of fact, Maeri told you not to go over a foot, didn't he?

Mr. Holman: Just a minute. Your Honor, I submit that's not proper cross-examination.

The Court: Overruled.

A. I don't know as he told me not to go over a foot. He told me that a foot outside of the concrete line was what I was to dig.

Q. Now on job 1068 Mr. Maeri at that time was putting the structures in and digging the excavations himself, was he? A. Yes. [1736]

Q. And what practice did he follow, then, in installing the structures?

A. They were all assembled in the job yard, hauled out on trucks, and lowered into the excavations with a boom truck.

Q. The panels, then, were assembled together in structure form? A. Yes.

Q. And then inserted in the excavations as a unit? A. Yes.

Q. Rather than panel by panel? A. Yes.

Q. Now, you say there was no sand blowing on 1062 while you were there. There again, I assume the terrain was frozen, and there wasn't any dirt blowing around?

(Testimony of James A. Black.)

A. Well, it was frozen, and there was very little wind at that time of the year there, as I recall it.

Q. Now, it is a fact, is it not, Mr. Black, that the carpenters on the Concrete Construction crew were forced to wait continuously because of the fine grading not being done on the excavations ahead of them?

A. Well, I couldn't say that they were waiting continuously while I was there. There was times they waited.

Q. Well, didn't it happen continuously throughout the time you were there, Mr. Black? [1737]

A. Over the period of time, yes, they waited different times all through my part of the work.

Q. Counsel interrogated you about this one structure that the carpenters were kept waiting for two and a half days. What I'm getting at is, that isn't the only structure where the carpenters had to wait because the fine grading wasn't done?

A. No, that wasn't the only structure.

Q. The fact is that through the entire time you were there you just didn't have enough men for fine grading to keep ahead of the carpenters, isn't that so?

A. Well, I was fairly well ahead of them most of the time, with exceptions of the fact that sometimes the fine grading wasn't just as it should have been. There may have been a few times when they had caught up to me entirely.

Q. Pardon?

A. There was a few times when they caught up

(Testimony of James A. Black.)

to me entirely, but as a rule I had structures fine graded ahead.

Q. By that you mean within two or three tenths?

A. Yes, there was times when structures was too high, and I had to go back and dig them down, and dig the curtain walls.

Q. Now, do you remember giving a statement, Mr. Black, to Mr. Darcy and Mr. M. C. Schaefer on October 25, 1946? A. Yes. [1738]

Q. I'll ask you if you did not at that time make this statement to them, in your own writing——

Mr. Holman: Just a moment. May it please the Court, I object to this as improper cross-examination, unless the witness is furnished a copy of the statement. I think it is improper for counsel to read from a statement into the record, a statement signed by this witness.

The Court: Well, perhaps you had better identify it first, as to it being signed by him, and then you can ask him concerning certain portions of it.

Mr. Olson: He may say yes, he said that. I'd just as soon put this in.

(Whereupon, written statement of James A. Black was marked plaintiff's Exhibit No. 83 for identification.)

Q. (By Mr. Olson): Showing you, Mr. Black, plaintiff's identification 83, I'll ask you, is that your signature? A. It is.

Q. And that's a statement, is it not, that you gave Mr. Darcy and Mr. M. C. Schaefer?

A. It is.

(Testimony of James A. Black.)

Q. Would you care to read it, Mr. Black?
(Counsel handed the statement to the witness).
This printing is in your handwriting, is it not?

A. Yes. [1739]

Q. In other words, this entire letter or statement was written by yourself? A. That's right.

Q. I'll ask you if you did not in this statement say "I was not allowed men enough at any time to perform this work." Well, I have to go back beyond that, to show what it was: "From the time I started fine grading and excavating for structures on 1062 I was repeatedly ordered by Mr. Macri to not waste any time or be too particular about fine grading?"——

Mr. Holman: I object to this being read into the record; if it is going to be admitted in evidence——

Mr. Olson: Well, I offer it in evidence.

The Court: I wouldn't think it would be admissible in evidence. He may admit he said that. Overruled.

Q. (Continuing the reading) "that two or three tenths was close enough, and to not dig the holes over one foot larger than the structure, also that I was not to slope the banks, but leave them vertical. I was not allowed men enough at any time to perform this work and keep ahead of form setters working for the Concrete Construction Company. Their carpenters were forced to wait continuously." Now, did you make that statement, Mr. Black?

A. I did.

Mr. Olson: That's all. [1740]

(Testimony of James A. Black.)

Redirect Examination

By Mr. Holman:

Q. Mr. Black, which is true, what you testified on the stand, or what counsel asked you?

Mr. Olson: If the Court please, I don't think that's a proper question.

The Court: I doubt that that is proper. He can explain his statement, if he wishes. I don't think it is proper to ask a witness "When were you lying?" which is what is implied here.

Q. I didn't mean that. I mean as between that statement, is that statement inapt, or is the statement which you made on the stand inapt, with respect to the help you employed?

A. Well, the word "continuously" in that statement is really misplaced.

Q. May I see the statement?

A. They waited several times for me, or a number of times, but they weren't always waiting, and I really didn't have enough men all the way through. I said I had from one to five men, where I should have had at least a normal crew of from four to six men.

Q. Were there times when you had enough men?

A. There was a few times when I had enough men.

Q. Now, you say the word "continuously" was misplaced in this statement that counsel interrogated you about. Was that suggested to you, sir?

A. No, sir.

(Testimony of James A. Black.)

Q. Or did you place it there yourself?

A. I placed it myself.

Q. And instead of "continuously" being at that point, is there a different point it should be at, or do you say that the word "continuously" should not have been used, Mr. Black?

A. I really don't believe it should have been used.

Q. Now, Mr. Black, were you furnished a copy of that statement? A. Yes.

Q. And you had a copy of that statement when I served the subpoena upon you, sir?

A. I had it at home, yes.

Q. And is it or is it not a fact that I requested a copy of that statement then?

Mr. Olson: Your Honor, that's immaterial, whether or not he requested a copy of that statement. The record shows, your Honor, that a copy of the statement was submitted to counsel while Mr. Black was on the witness stand before. I see no reason why he should harass this witness as to whether or not he——

Mr. Holman: I'll not pursue it further, your Honor. I think it speaks for itself.

Q. (By Mr. Holman): Mr. Black, is it or is it not a fact that [1742] the carpenters within your presence actually wasted time?

Mr. Olson: That's asking for a conclusion.

Mr. Holman: It is redirect.

The Court: Well, it is a leading question.

Mr. Olson: And it is suggestive.

(Testimony of James A. Black.)

The Court: I'll sustain the objection.

Q. (By Mr. Holman): In your opinion, and from your experience, was the waiting of the carpenters necessary in the instance that you testified, when they were waiting while you were fine grading?

Mr. Olson: Now, if your Honor please, that's asking for a conclusion of this witness, as to whether or not it was necessary for these carpenters to wait. I assume he's asking him if there wasn't something else they could have been doing.

The Court: I'll sustain the objection.

Q. With the exception of the instance that you identified to me, Mr. Black, and testified about, where the carpenters waited, are you able now after counsel interrogated you to indicate other places and other structures where they waited?

Mr. Olson: That's objected to as not being proper redirect examination.

The Court: I'll overrule the objection.

A. I don't know of any particular structures.

Q. You do know about this structure I asked you about? A. Yes.

Q. And you told me about that?

Mr. Olson: That's leading.

The Court: Do you claim the privilege of cross-examining him, or is this still redirect?

Mr. Holman: Redirect, your Honor.

The Court: It is getting into cross-examination.

Q. (By Mr. Holman): Mr. Macri on 1068 to your knowledge completed the excavation, struc-

(Testimony of James A. Black.)

tures, and the pouring of the concrete and the performance of the job?

Mr. Olson: That question is objected to as being leading and suggestive.

The Court: Yes, that's very leading. Sustained.

Q. Well, what is the fact with respect to whether or not to your knowledge Mr. Macri did complete the excavation, the fine grading, and the pouring of structures? A. He did.

The Court: On 1068?

Mr. Holman: Yes.

The Court: I didn't think there was any question about that.

Mr. Holman: Well, I didn't either. That's all.

Recross-Examination

By Mr. Olson:

Q. Is it not also a fact, Mr. Black, that the men that you [1744] had to work under you doing this fine grading didn't know how to do it?

A. They were inexperienced. They didn't know what it was all about. It had to be staked perfectly.

Redirect Examination

By Mr. Holman:

Q. Well, Mr. Black, you did your best to instruct the labor that you could get? A. Yes.

Mr. Olson: Well, that question is objected to as being leading.

The Court: Well, I'll overrule the objection.

Mr. Olson: I admit he did his best with what he had to work with.

(Testimony of James A. Black.)

Q. Mr. Black, the thing I want to know is whether or not you as fine grader used the best labor you could obtain, and did the best fine grading you could; did you or didn't you? A. I did.

The Court: Any further questions? Mr. Black then will be excused from further attendance.

(Whereupon, there being no further questions, the witness was excused.)

The Court: We'll take a recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was [1745] resumed.)

Mr. Holman: Would your Honor prefer to rule upon the letters, or continue the testimony of Mr. Macri?

The Court: Well, if you have another witness here you want to get through with, and Mr. Olson has no objection, why, the Court won't object to it.

Mr. Holman: Well, he's out.

The Court: I see. Well, you can take those up in whatever order you prefer.

Mr. Holman: I would prefer to have Mr. Macri continue to testify, your Honor, if it could be.

The Court: All right. I do think, though, that if you put Mr. Macri on again you should try to continue with him until he gets through. He's been on and off so much he'll wear his shoes out here.

Mr. Holman: That's my intention, your Honor.

SAM MACRI

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Holman:

Q. Handing you what has been marked identification 67, Mr. Macri, I'll ask you if that was served upon you or about the date indicated, March 15, 1946?

A. Yes.

Q. By the United States Government? [1746]

A. Yes.

Mr. Holman: I offer in evidence, your Honor, identification 67, notice of levy. I don't think the Court has inspected it. I may state in that connection that we have pleaded, your Honor, that that has been served upon us restraining the payment of this balance of fourteen odd hundred dollars that otherwise would have been earned on 1062, and I didn't feel yesterday, or at the time of making the motion at the end of plaintiff's case, that I should argue that, because it was not in evidence.

The Court: I see. This operates somewhat as a writ of garnishment in holding up any monies due from Mr. Macri to Mr. Schaefer; is there any question about that, the effect of it?

Mr. Olson: I don't know what it is, your Honor, but I perceive that it should be admitted in evidence, probably.

Mr. Holman: I submitted it to Mr. Schaefer, your Honor, and he said that it had not been paid, on his examination yesterday or the day before.

(Testimony of Sam Macri.)

The Court: Yes. It will be admitted. That is defendant Macri's identification 67.

(Whereupon, Defendant Macri's Exhibit No. 67 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, did the use plaintiff Schaefer furnish you any schedules of operations at any time? A. No, sir.

Q. Did the use plaintiff Schaefer or any of his employees at any time furnish you with any notice of claim as to insufficient performance of excavation for structures, either as to rough excavation or as to fine grading? A. No, sir.

Q. Did you at any time receive any notification from the Bureau of Reclamation, United States Bureau of Reclamation, Department of Interior, regarding any improper excavations of any structures? I'm speaking all this time of 1062, sir.

Mr. Olson: Just a minute. That's objected to on the ground it is wholly immaterial whether the Bureau of Reclamation ever complained to Mr. Macri about the excavations, your Honor.

Mr. Holman: It is a matter of notice, your Honor, in compliance with the sub-contract. That is my purpose.

The Court: I didn't get what your purpose is.

Mr. Holman: I say, it is a matter of notice, in

(Testimony of Sam Macri.)

compliance with the requirements of the Macri-Schaefer sub-contract. I'm willing to concede that if the Bureau had notified Mr. Macri, it would be a sufficient notice, [1748] whether or not Mr. Schaefer had notified him. That's my purpose.

The Court: I see. I'll overrule the objection.

Witness: No, sir.

Q. Sir? A. No.

Q. Did you give your respective superintendents in charge of the operations on 1062 any instructions with respect to furnishing lumber without delay, for the purpose of building forms?

Mr. Olson: Just a minute. Your Honor please, that's objected to. It isn't a question of what instructions he gave his superintendents. That's asking for hearsay. The question is what did they do. If he's going to ask for a conversation it has to relate to some conversation when we're present, and he ought to do like he made me do, state when and where and in whose presence.

The Court: It seems to me that would be inadmissible with this exception, that where certain witnesses have testified with reference to instructions he gave them concerning the work, but I do not recall that there was any testimony as to instructions with reference to lumber. The objection will be sustained.

Mr. Holman: The one instance I do call your Honor's attention to was the testimony of Mr. Stickney, [1749] plaintiff's witness, that he did not have instructions.

(Testimony of Sam Macri.)

The Court: Did not have what instructions?

Mr. Holman: As to lumber.

The Court: I don't recall any testimony with reference to lumber, or testimony as to instructions given by Mr. Macri with respect to lumber.

Mr. Olson: Your Honor, in order to save time I'll withdraw the objection.

The Court: Yes, all right.

Mr. Holman: Did you, Mr. Macri? Will you read the question?

(Whereupon, the reporter read the last previous question.)

Q. The answer would be yes or no, Mr. Macri.

A. Yes.

Q. I'll ask you specifically whether or not you gave that instruction to Mr. Stickney?

Mr. Olson: I would like to have him say when and where, your Honor.

Q. First, did you give that instruction to Mr. Stickney?

A. I been giving that instruction to my superintendents.

Q. I asked if you gave it to Mr. Stickney.

A. Well, yes.

Q. Now, when and where did you give that instruction to Mr. Stickney? [1750]

A. Right after he started working on the job, I called his attention, I gave him free hands, hire, fire, and whatever you want.

Q. I'm talking about lumber.

(Testimony of Sam Macri.)

A. And on lumber, I told him give their men and try to get the list two or three days ahead, because I'm going to try to run lumber from the coast; in case they don't give you the list and it's short time, just get in the truck and go get it locally.

Q. When did you give him those instructions?

A. When he started work.

Q. And where, at Seattle, or locally?

A. Right in Sunnyside, in the office.

The Court: You're right. I recall he testified he had no instructions to buy lumber locally.

Mr. Holman: That's what I had in mind, your Honor.

Q. Did either the use plaintiff Schaefer or any of his employees at any time deliver to you any list of lumber? A. No, they didn't.

Q. Did you at any time receive any list of lumber through your own employees from the use plaintiff?

A. Only list of lumber I had from the engineer Ashley, and I told Mr. Ashley—

Q. Never mind what you told Mr. Ashley. You got it from Mr. Ashley? [1751]

A. Mr. Ashley, yes.

Q. And was that list as received filled?

A. Well, he said Mr. Darcy told him—

Q. Just a minute; you can't say what Mr. Ashley said. I say, was that list filled? Did you fill the list that was furnished? A. Yes.

Q. Was there anything unusual in that list as submitted to you through Mr. Ashley?

(Testimony of Sam Macri.)

Mr. Olson: I'm going to object, your Honor, to testifying to the contents of a written document. If it is a list I assume it must be in writing, and they should produce the document.

Q. Do you have that list, Mr. Macri?

A. I haven't got it here.

Q. Well, do you have it at all, to your knowledge, now?

A. Yes, I believe it's in the file someplace.

Q. Sir?

A. I believe it's in the file someplace.

Mr. Holman: I submit counsel is right, your Honor. It is up to me to produce the list, as better evidence.

The Court: Well, the list isn't available. I'll overrule the objection.

Q. Mr. Macri, was there anything unusual in the requirement for lumber, on that list? [1752]

Mr. Olson: Now, your Honor, that question, I don't know what it means, "anything unusual."

The Court: Is that a list submitted by——

Mr. Olson: It is a list given to him by his superintendent, Mr. Ashley.

Mr. Holman: No, a list he says given by Mr. Darcy to Mr. Ashley, and by Mr. Ashley to him.

Mr. Olson: Now he says was there anything unusual on it.

The Court: Well, I don't know what that would be without having him answer.

Witness: Yes, there was flooring; they asked for some flooring.

(Testimony of Sam Macri.)

Q. Flooring? A. Flooring, yes.

Q. For what purpose? Did they indicate on the list?

A. Well, this particular lumber was to be used on the stilling pool and chute, and they asked for flooring, so I went ahead and tried to get it, but I sure done my best to get it.

Q. Did you get flooring?

A. Yes, I got flooring.

Q. And did you furnish flooring?

A. Yes, and at that time flooring was worse than gold, in those days. [1753]

Q. I don't get it.

The Court: Hard to get.

Q. What do you mean by "worse than gold"?

A. Well, you know, during the war, flooring was used for more essential jobs, and everything else; it was hard to get it.

Q. Still you got it and you furnished it, did you?

A. I got it.

Q. I'll ask you, Mr. Macri, whether in each instance of any report to you for delivery of lumber from Seattle, you did furnish it—did you furnish it? A. Lumber?

Q. Yes, sir. A. Yes, I did.

Q. And I'll ask you whether or not in the acquiring and delivery of that lumber you selected any lower grade of lumber than could be acquired on the market? In other words, did you buy second rate lumber, or not? A. No, sir.

(Testimony of Sam Macri.)

Q. Did you at any instance, at any time, Mr. Macri, buy any second-hand lumber, to your knowledge?

A. Not in my knowledge.

Q. Sir?

A. Not in my knowledge.

Q. I'll ask you whether or not at any time after lumber had [1754] been furnished you received any notice in writing or otherwise within ten days claiming that such lumber was defective?

A. Never.

Q. Or unfit for use?

A. No, sir.

Q. And when was the first time that you received any writing from the use plaintiff with respect to any claim of insufficient lumber?

A. I never had any writing as far as lumber is concerned, not sufficient.

Q. Did you at any time during the progress of the job?

Mr. Olson: He just got through saying he never did.

Mr. Holman: Well, then, all right, I'll strike the question, having been answered, "never" being a long time. You may inquire.

Cross-Examination

By Mr. Olson:

Q. Mr. Macri, you just got through stating that you never got a notice within ten days about lumber being defective. Do you remember testifying that?

A. Yes, sir.

Q. That's ten days from when?

A. I never had any written notice any time.

(Testimony of Sam Macri.)

Q. Never had any what? [1755]

A. Never had any written notice any time, from Schaefer.

Q. And you never did furnish any second-hand lumber? A. Not what I know.

Q. How about this lumber here, plaintiff's Exhibit 29? Did you furnish this lumber?

A. You mean that particular lumber?

Q. I mean this particular lumber that I'm showing you right here, plaintiff's Exhibit 29.

A. Well, you mean the way she is now?

Q. No; I mean did you furnish Concrete Construction Company this lumber?

A. Well, I can't tell you now, because I don't know where they take that lumber.

Q. Pardon?

A. I can't tell you, because I don't know where that lumber came from.

Q. Well, did you furnish them any lumber like this?

A. The lumber that I furnished was lumber that come in from the mill.

Q. You never furnished them any used lumber?

A. Not what I know.

Q. Well, would you know about it?

A. Probably I would, if I did.

Q. You don't know anything about this lumber that had been used in concrete before, that you furnished? [1756]

A. I don't recall there was any used lumber over there.

(Testimony of Sam Macri.)

Q. Did you ever get down to the yard on the Roza Project, Mr. Macri? A. Yes.

Q. Did you ever see any of that lumber down there?

A. Oh, I see a lot of that pile of lumber stuck up over there, a lot of lumber. I saw a lot of lumber over there when they remodel that partition, on the yard, you know, sometimes when they remodel some of their sections.

Q. My question is, did you ever see any of this type of lumber, I mean of the type of Exhibit 29, in the yard down there?

A. I just got through saying I saw some of that lumber when they took them out of that old partition for remodel.

Q. Then you did see some of that lumber?

A. That's the same lumber they used themselves, that they bring from the field to the yard.

Q. Some that they had already used?

A. Yes.

Q. Did you ever see any lumber like plaintiff's 29 in the stock piles down there on the Roza Project? A. No, I didn't.

Q. Now, you say that there was no notice ever given you of poor excavations. You were out on the project, were you not, Mr. Macri? [1757]

A. Yes.

Q. And you saw these excavations and the way they were, did you not?

A. Yes, I saw them there excavations.

(Testimony of Sam Macri.)

Q. So you already knew everything about anybody could write you about?

A. What do you mean by that?

Q. I mean that you actually saw these excavations out on the field.

A. Well, I saw, when I went over there with a man to measure.

Q. How often were you out on the project?

A. Oh, practically once a week.

Q. Practically once a week?

A. Practically; sometimes less.

Q. Sometimes twice a week?

A. I say practically once a week.

Q. And you went out on the field——

A. Usually with the superintendent or the man in charge.

Q. ——and saw these excavations?

A. I looked some over.

Q. And you saw that the walls were vertical?

A. Not all.

Q. Pardon? A. Not all.

Q. Not all? [1758] A. No.

Q. You also saw, did you not, Mr. Macri, saw the carpenters doing digging? A. No.

Q. Mr. Schaefer's carpenters? A. No.

Q. You had superintendents on this job, did you not? A. Of course.

Q. And how many superintendents did you have on this job?

A. Well, an engineer or superintendent always was on the job.

(Testimony of Sam Maeri.)

Q. Well, how many did you have, all throughout the job?

A. Well, all through the job, you mean?

Q. All right; your first was Mr. Staples?

A. First was Mr. Staples, yes.

Q. How long was he there?

A. He was there until Mr. Ashley went in.

Q. He was there until Mr. Ashley came on?

A. Yes.

Q. All right.

A. And of course, Mr. Ashley is an engineer, and everything else, and Mr. Ashley wanted to come back to Seattle, and Mr. Stickney went in.

Q. That's three.

A. And then Mr. Stickney hire Mr. Black.

Q. That's four. [1759]

A. For helping, he's supposed to be an engineer, and Mr. King, I hired myself, and he's an engineer.

Q. Mr. King hired himself?

A. I hired him.

Q. So that's five of them you had on this job?

A. Yes.

Q. And one or the other of them were on the job all the time? A. Yes.

Q. Actually out in the field and seeing what was going on?

A. That's what they were hired for.

Q. That's what they were hired for?

A. That's right.

Q. Now, these excavations that you saw, you say you checked 75 of them? A. Yes, sir.

(Testimony of Sam Macri.)

Q. And do you state, Mr. Macri, that the banks were sloped to a one to one slope?

A. I state Mr. Klugg and Mr. Mercelle wanted to measure.

Q. That's not the question, Mr. Macri. Were they to a one to one slope?

A. I never put a level to find out if they were a one to one slope, but they were a slope, yes. This one to one slope is practically a regular highway, when you want to make it that way, for looks, nothing else. [1760]

Q. You know what a one to one slope is?

A. Yes, I do.

Q. A 45 degree angle?

A. Matter of fact, one to one is a regular highway shoulder.

Q. All right; were these excavations, the banks, sloped to a one to one slope?

A. Some of them were sloped. Now, I can't swear one to one, because I never put a level to see if they're a one to one, but when we dig with a hoe, it stands to reason always got to have some kind of slope. You never can cut right straight down. The bucket is dragging.

Q. You were to do the excavations, were you not, Mr. Macri? A. Yes.

Q. That wasn't any part of the Concrete Construction Company's work, was it?

A. No, I agreed to do it.

Q. Pardon? A. I agreed to do it.

(Testimony of Sam Macri.)

Q. Now, do I understand that you don't now know whether the banks were sloped to a one to one slope, or approximately so, or not?

A. I say some of them were, some were less, some were more; I can't swear exactly now. You want me to answer a question of one to one; I can't swear that kind of stuff.

Q. You remember when your deposition was taken over in [1761] Seattle, do you not, Mr. Macri?

A. Yes.

Q. Isn't it a fact that you testified over in Seattle that every one of these excavations were excavated a foot out from the neat line of concrete at the foundation of the structure, and that every bank with the exception of one was sloped to a one to one slope?

A. At the time I don't recall, the first time I ever heard this one to one slope.

Q. Did you so testify?

A. I testified that all was bigger, plenty big enough to do the work, and some was sloped, the way I understood. Matter of fact, I don't know what it was, this one to one slope, then.

Q. Nobody's asked you a question now. I'm reading from page 10 of your deposition, Mr. Macri.

“Question: Mr. Macri, did you on any of the excavations excavate out so those excavations at the foundation was a foot out from the structure to be installed, and the wall from the bottom of the excavation to the surface of the ground was on a slope of one to one?

“Answer: We make each one that way.

(Testimony of Sam Macri.)

“Question: You made every one on a one to one slope?

“Answer: Yes; practically every one.

“Question: Practically every one?

“Answer: Yes. I never watched one by one, but the superintendent was there and the inspector on the [1762] job should know about it, I guess.”
You so testified, Mr. Macri? A. Correct.

Q. And is that a fact, that you did excavate them all out one foot and on a one to one slope?

A. As far as clearance, it was always one foot or more. What I meant there, when you put the hoe bucket on top, it's always bound to slope more or less.

Q. Always bound to slope more or less?

A. Yes.

Q. That's on one side?

A. All sides. If you know what a hoe bucket is, you can't help; they got to be sloped when you pull the bucket out.

Q. Reading from page 16, line 21, of your deposition:

“Question: Then it is your position, is it, Mr. Macri, that as far as any of the excavations were concerned which you yourself inspected, they were all excavated in such a manner that there was a hole and a space at least one foot horizontal out from the form to be installed at that time, and that the outside wall from the bottom of the excavation to the surface of the ground was on a slope of one foot horizontal to each foot perpendicular?

(Testimony of Sam Macri.)

“Mr. Holman: I object to that question as impertinent and improper in its form. You have asked as to a fact, and now you are asking as to his position. I advise the [1763] witness not to answer the question. Refuse to answer the question.

“Question: Do you refuse to answer the question?

“Mr. Holman: He does. We will testify to facts. If you will change it to ask for facts, we will answer.

“Mr. Olson: I think that is playing on words, but I will rephrase the question.

“Question: Is it your testimony——

“Mr. Holman: The same objection, right now.

“Mr. Olson: And you advise him not to answer the same question?

“Mr. Holman: Because he has already testified.

“Mr. Olson: Do you refuse to answer the question?

“Mr. Holman: He does. You can ask for any fact you want.

“Question: Mr. Macri, were all of those excavations which you examined excavated in such a manner that there was a horizontal space of at least one foot from the outside of the structure to be inserted, and the outside wall at the foundation of the structure?

“Mr. Holman: I object to that question for the reason that the plans and specifications control, therefore it is immaterial—but go ahead and answer the question.

(Testimony of Sam Maceri.)

“Answer: Yes. It was all but one which was in the rough. There was plenty of room to put the form in, and Schaefer called attention to that.

“Question: All of them that you examined——

“Answer: Yes, sir, all but one. That was rough.

“Question: ——were excavated so that there was at least a foot horizontal from where the [1764] structure would be to the outside wall at the foundation of the structure?

“Mr. Holman: The same objection.

“Answer: Every one was more than a foot out.

“Question: The outside wall on each of the excavations you examined were they on a slope of at least one foot horizontal to the outside for each foot vertical up to the surface?

“Mr. Holman: I object to that question as being meaningless. The excavation does not have a wall.

“Mr. Olson: I never saw one that did not have one.

“Mr. Holman: An excavation?

“Mr. Olson: I am talking about the outside wall of the excavation. If you can have a hole without a wall, I want to see one.

“Answer: It was above the ground, so how can you get a slope? You just make a big hole so they can set the form. Some of the structures were above the ground.

“Question: I am speaking of the surface of the ground, from the bottom of the excavation, from the bottom of the excavation to the surface of the ground, was there a slope there of one to one? That is, one foot horizontal for each foot vertical?

(Testimony of Sam Macri.)

“Mr. Holman: It is immaterial as long as he complied with the specifications.

“Answer: I think there was a slope on each one.

“Question: Was there at least that much slope?

“Answer: Why, sure. There was some bigger ones where we left the slope.

“Question: I am not asking what you had to do. What did [1765] you see there?

“Answer: Some was two and a half feet deep, and you can see a little hole. Some was as big as that table. The structures were all straight up and down. You mean the completed wall.

“Question: I am talking about the excavations which you made.

“Answer: There was a step-up and the slope was that way. We have to slope them.

“Question: Answer my question. Don't say what had to be done. I want to know what was there. I ask you again.

“Answer: Like it was on the plans.

“Question: Never mind the plans. Tell me what you saw on the job when you inspected it. Were the outside slopes of these excavations—were they vertical when you saw them, or were they on some slope?

“Answer: They are a different type. We make them the way they are shown on the plans.

“Question: The ones you saw were some of the outside walls vertical up and down?

“Answer: It was exactly the way the blueprints called for.

(Testimony of Sam Macri.)

“Mr. Olson: We ask that that be stricken.

“Mr. Holman: I resist, on the ground it is responsive.

“Mr. Brown: It seems to me that what he was required to do was according to the plans and specifications, and not what is in the mind of the counsel, what he was required to do. The issue we are trying to arrive at is whether he did it according to the plans and specifications.

“Mr. Olson: And we will not [1766] find out by this witness saying he did it by the plans and specifications.

“Mr. Holman: You will find out facts if you ask anything but catch questions. I will not let you ask catch questions, and if you do I will stop it.

“Mr. Olson: No catch question have been asked.

“Mr. Holman: You are talking about the wall of an excavation. If that is not a catch question, I don't know one.”

Mr. Hawkins: I don't see what relevancy reading this deposition has at this time. If this is cross-examination it is certainly far afield of anything that has been testified to today. If he is reading it into the record for any purpose, as the rule says, it should have been done in his case in chief, not at this time. I can't see any purpose in reciting the wrangle counsel had when they took this deposition.

The Court: I thought he was going to get down to some statement Mr. Macri made about excavations.

(Testimony of Sam Macri.)

Mr. Olson: Well, I'm getting to it, your Honor, but it took about fifteen pages to get there.

The Court: All right, if that is what you had in mind.

Q. (Continuing the quotation from the Macri deposition.)

“Question: Mr. Macri, they object to using the word ‘wall.’ By that term I mean the outside of the excavation. [1767] What do you call that, so we will not have any question about it? What do you call the outside of the excavation?”

“Answer: When we dig a structure I call it digging the hole.

“Question: When you dig the hole in the ground what do you call the outside of it?”

“Answer: We just call it a hole. We don't call it anything.

“Question: You wouldn't know what to call it?”

“Mr. Holman: He didn't say that.

“Question: What do you call it?”

“Answer: We call it a structure.

“Answer: Yes, sir.

“Question: The excavation you made you called a structure?”

“Answer: Yes, sir. And it is a wall when we put in the concrete wall.

“Question: You did not place the concrete?”

“Answer: No.

“Question: That was up to Mr. Schaefer?”

“Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: You were through with the hole and away from it before the form was placed or the concrete was poured?”

“Answer: What do you mean by away?”

“Answer: You were gone and moved?”

“Answer: Yes.

“Question: Now, reading Specification No. 1062, Page 23, beginning with the last word on the sixth line from the top: ‘Except for the limitations described above, excavations for structures will in general be measured for payment to lateral dimensions of one foot outside of the foundation of the structure, and to a slope of one to one for common excavation.’ Do you—

“Mr. Holman: Finish the sentence. [1768] You can’t stop in the middle of a sentence.

“Mr. Olson: Will you let me examine this witness?”

“Mr. Holman: I will not let you trick him.

“Mr. Olson: Don’t anticipate somebody will not be right about something.

“Mr. Holman: Go ahead.

“Question: Have you in mind what I have read, Mr. Macri? I will read it again. ‘Except for the limitations described above, excavations for structures will in general be measured for payment to lateral dimensions of one foot outside of the foundation of the structure.’ Now, that means one foot horizontal at the foundation or the base of the bottom of the excavation, is that correct?”

(Testimony of Sam Macri.)

“Mr. Holman: I advise you to refuse to answer. It speaks for itself. Refuse to answer. The question is immaterial and irrelevant and not the best evidence. The specifications control and there are the words.

“Question: Do you refuse to answer?

“Mr. Holman: He does.

“Question: Is it a fact that each of the excavations that you inspected with reference to the foundation was excavated in accordance with that part of Specification 1062 which I just read?

“Answer: Yes, sir. Every one was right.

“Question: Was each one dug in accordance with that part of the specifications?

“Answer: Yes, sir; all but one that I told you before; the rough one was a little wide.

“Question: When you say in accordance [1769] with the specifications, is it in accordance with that part of the specifications which I just read?

“Mr. Holman: I object to that question because there is a proviso there.

“Mr. Bullivant: I do not think counsel should constantly interrupt in light of the stipulation which was made in regard to relevancy, when that objection can be made at the time of trial. It interrupts this proceeding, and in the light of the further fact counsel's question was limited to particular language of the specifications.

“Mr. Holman: That is all true, but the last question was not according to that.

(Testimony of Sam Macri.)

“Mr. Brown: I want to join in Mr. Holman’s objection to the form of the question. It is the form of the question I am objecting to, and that is one thing that has to be done at this time.

“Mr. Olson: What objection are you making to the form of the question which I just asked?

“Mr. Holman: I am satisfied with my objection.

“Mr. Brown: I join in Mr. Holman’s objection to the form of the question. The part of the specifications you read applies to how much payment the Government will allow the contractor, and has nothing to do with the relationship between this contractor and the sub-contractor.

“Mr. Holman: I join in that objection.

“Question: Now, Mr. Macri, each excavation which you inspected, with the exception of one, was so excavated [1770] that the foundation of the excavation had a lateral dimension of one foot outside the foundation of the structure, or of the form to be inserted?

“Mr. Holman: I object to your question, on the ground it is immaterial and outside the issues.

“Question: Will you answer the question?

“The Witness: Shall I answer?

“Mr. Holman: All right.

“Answer: It was a foot or more than a foot.

“Question: And the outside slopes of those excavations, still excepting this one, that you inspected, were on a slope of at least one to one? Is that true?

“Mr. Holman: The same objection.

(Testimony of Sam Macri.)

“Answer: I don’t know if I shall take the plans and look at them.

“Question: Is that a true statement or it not a true statement?

“Answer: I would have to look at—as I tell you before, every one was a little different, and they would have to be sloped.

“Question: And were they on a slope of at least one to one?

“Mr. Helman: I object as immaterial.

“Question: They either were or they were not?

“Mr. Holman: If you ask if they were sloped so the bank would stand, I do not object.

“Mr. Olson: We are entitled to try this case on our own theory. We are willing to rest on our opinion whether the questions are material or not. Read the question.

“(The reporter read last several questions.)

“There has been so much interruption——

“Mr. Holman: Just a minute. [1771] He will answer.

“Mr. Olson: Just a minute, gentlemen. I don’t want this deposition to come out with a question and then four or five pages of argument in between the question and the answer. I will rephrase the question.

“Question: Were each of the outside surfaces of the excavations you examined, with the exception of that one, on a slope of at least one to one?

(Testimony of Sam Macri.)

“Mr. Holman: The same objection I made to the previous question. You may answer, if you know.

“Answer: Yes, sir; they were all sloped. They were all right.

“Question: Is your answer to my last question ‘yes’?

“Answer: Yes.”

(End of quotation.)

Q. (By Mr. Olson): Did you so testify, Mr. Macri? A. You mean——

Q. I asked you if you so testified, in accordance with the questions and answers I just read?

A. Must have did, if it is write over there.

Q. Pardon? A. Yes, I testified.

Q. And do you say then, Mr. Macri, that each of these excavations, that the bank opposite which an intervening form had to be inserted, between the concrete, was on a slope of one foot to one foot, or approximately so?

A. I never tell you any time one to one. That's the first time I heard of that one to one slope, but I told you [1772] practically every one was a slope.

Q. You say now is the first time you ever heard about a one to one slope?

A. That day you mention about it over there, but I told you practically they are more or less all sloped, but I don't say one to one.

Q. When was the first time you heard anything about a one to one slope?

(Testimony of Sam Macri.)

A. That time you bring it up over in Mr. Holman's office.

Q. You mean when we took this deposition?

A. That's the first time I heard of this one to one, far as this case is concerned.

A. That's the first time you heard of this one to one slope? A. Yes, sir.

Q. You never knew anything about it when you were performing the contract?

A. Nobody ever mentioned it's a one to one slope to me before.

Q. But you do say, do you, Mr. Macri, that each one of these excavations out here, that the banks were sloped one to one?

A. I'll say more or less, they all had some slope, yes.

Q. Some slope; did they have that much, or were they practically vertical?

A. I won't swear for anybody else until I measure and make [1773] sure.

Q. You say you can't say for sure whether they were practically vertical?

A. Every one had some kind of slope, because you can't cut those straight with a hoe.

Q. And that's why you say there was some slope, because a hoe won't dig them——

A. Not a structure; you can dig a narrow ditch, but not a structure, because you got the four walls in a structure.

Q. You made no measurements of any of these excavations yourself, did you, Mr. Macri?

A. No; I never said I did.

(Testimony of Sam Macri.)

Q. And you have no measurements on any of these structure excavations?

A. You mean about the width, the length, or how?

Q. You have no measurements yourself of these excavations that were made out on 1062?

A. No, I haven't got any measurements.

Q. Now, you were to furnish the lumber on this job, that's correct, is it not? A. Yes, sir.

Q. And you say that the only list of lumber that was ever given to you was one given by Mr. Ashley for the stilling pool and chute?

A. That's the only list I have. [1774]

Q. That's the only list you ever had; when did you get that?

A. Oh, it was during the summer.

Q. It was during June, wasn't it, 1944?

A. No, I think it was after June.

Q. Pardon?

A. No, I think it was later on. I can't say for sure about that.

Q. Did Mr. Staples ever give you the list for the chute lumber and stilling pool lumber that was given to him in June, 1944? A. Mr. Staples?

Q. Yes.

A. No, Mr. Staples never gave me any.

Q. He didn't give it to you? A. No.

Q. Now, do you know when Mr. Ashley gave you any list, then?

A. Yes, I recall Mr. Ashley said he got it through Darcy, I understand it, so Ashley said.

(Testimony of Sam Macri.)

Q. Which list did Ashley send you, the first, second, third or fourth list he gave Ashley?

Mr. Holman: I object, that is improper cross-examination.

The Court: I'll sustain the objection unless he knows there was more than one list furnished by Darcy.

Q. Well, can you tell me whether there was, then, Mr. Macri? [1775]

A. Well, that's the only list I have for this stilling pool.

Q. When did you get it?

A. Well, it was during when Ashley was over there; I don't know if it was July or August.

Q. Mr. Ashley went there on the 22nd of June, did he—or do you know?

A. I'll have to look up that; I can't say for sure.

Q. Mr. Staples left, didn't he, on the 22nd of June, 1944? A. Yes.

Q. And Mr. Ashley went on right after him, didn't he?

A. Yes, he took Staples' place.

Q. When did you furnish that lumber for the stilling pool and chute?

A. I think it was during the first part of February, if I remember right.

Q. Yes, 1945, that's right, isn't it?

A. Yes, because Mr. Darcy told me, I asked him——

Q. Never mind.

(Testimony of Sam Macri.)

Mr. Holman: I submit he has a right to finish his answer.

The Court: He can answer the question and stop at that.

Q. This lumber you furnished was in February, 1945, for the stilling pool and chute?

A. That's the flooring, yes. [1776]

Q. That's the rest of the lumber too?

A. It was all special lumber he wanted.

Q. And that was delivered in February, 1945?

A. That's when it was delivered, in February, the first part of February.

Q. All right; and do you know about what day of February it was, 1945, that you furnished that lumber?

A. It was the first part of February.

Q. I'll ask you if it wasn't the 15th of February, 1945?

A. No, it was earlier than that.

Q. And when was your contract supposed to be completed on 1062?

A. Well, we had so many days from the notice we received. I'll have to look up and see about it.

Q. Well, it was February 8, 1945, wasn't it, that the work was all supposed to be done?

A. If that's what the contract calls, it must be correct.

Q. Well, you don't remember? Is that right?

A. Not unless I look, I don't know.

Q. Now, getting back, Mr. Macri, to the first part of your testimony, when you first went on the

(Testimony of Sam Macri.)

stand, you say you've been in the construction business for twenty-six years. Is that the last twenty-six years?

A. What do you mean by that?

Q. Well, I mean the twenty-six years which has been the last [1777] twenty six years' to pass.

A. I imagine so.

Q. Well, Mr. Macri, you should know. You say you've been in the general construction business for twenty-six years?

A. I say around twenty-six years.

Q. Now, do you mean the last twenty-six years?

A. Naturally I don't mean in the future.

The Court: Do you mean whether it is continuously, or whether there was a break in it? Is that what you want to know?

Q. Have you been in general construction business continuously, for the last twenty-six years?

A. Well, I started around twenty-six years ago.

Q. And have you been continuously at it ever since?

A. Well, I didn't work all the time, if that's what you mean.

Q. Well, did you engage in any other business during the last twenty-six years, other than the construction business?

A. Oh, yes; well, I did construction business; I had a tailor shop too.

Q. Had a what?

A. I was in tailor business too, while I did the construction business.

(Testimony of Sam Macri.)

The Court: Is that tailor? A. Yes. [1778]

Q. Oh, you had a tailor shop, you say?

A. Sure.

Q. Did you work in the tailor shop?

A. That's my main trade, designing and tailoring.

Q. Pardon?

A. That was my main trade, to start with.

Q. Your main trade to start with was a tailor?

A. Yes.

Q. When were you in the tailor business?

A. Oh, I started in 1912—no, before that.

Q. I mean when last were you in the tailor business, have a tailor shop?

A. Oh, I think I sold out, if I remember right it was after the World War, shortly after the World War.

Q. In the 1920's, sometime?

A. Around then, about 1925.

Q. Have you engaged in any other business during this last twenty-six year period? A. No.

Q. No other business?

A. I don't recall any other business beside that.

Q. You say you don't recall any other business?

A. No, I don't recall any other business.

Q. Now, when Mr. Staples or after Mr. Staples wrote to Mr. Schaefer, you say Mr. Schaefer called you on the telephone [1779] about sub-contracting a part of 1062? A. Yes.

Q. And then he came over to Seattle and met you, didn't he? A. Yes.

(Testimony of Sam Macri.)

Q. And there wasn't any contract signed that day? A. No.

Q. But he took the specifications home with him?

A. Yes, he took the plans and specifications.

Q. And did I understand you to say that he didn't have the structure lay-out plan?

A. No, I didn't have him.

Q. Pardon? A. I didn't have him, no.

Q. And you bid on this job without looking at the structure lay-out plans yourself?

A. That's all we got to bid on.

Q. What?

A. Just that plans and specifications. There isn't anything else when you bid on a job. That's all we got to go by, to bid on a job.

Q. Handing you plaintiff's Exhibit 12, Mr. Macri, didn't you have that when you bid on this job 1062? A. No, sir.

Q. Didn't have it at all?

A. No, sir; this Bureau of Reclamation supply those afterwards.

Q. How could you tell what you were going to build?

A. Well, we just go by those drawings and the unit.

Q. Well, show me on Exhibit 3, Mr. Macri, a diagram of the type of structures that you were bidding on for 1062, concrete structures.

A. Well, we bid on this unit here.

(Testimony of Sam Macri.)

Q. Show me on there the type of concrete structure that you were going to, that you were bidding on, to construct.

A. The type?

Q. Yes.

A. Well, they give you some idea here, just give you an idea, when you bid on a job. That's all it amounts to; you can tell the concrete, that's all you go by.

Q. Show me what page, so I can refer to it.

A. Well, you got this, and they show you the stilling pool and some of the concrete; that's all they give to you when you bid on a job.

Q. You're referring to drawing number 33?

A. Yes, and some structure detail here some place, and then they give you yardage of concrete. That's all we got to go by to bid on.

Q. You don't have the structure lay-out plans then?

A. No, sir.

Q. All right; now, Mr. Schaefer then came back at a later [1781] date?

A. Yes.

Q. And met with you again?

A. Yes.

Q. And is it this second meeting that you arrived at this figure of \$26.00 per cubic yard?

A. Yes, when he come back.

Q. That's the date you arrived at the figure?

A. Yes.

Q. And was the contract prepared that day?

A. I think that contract was prepared the same day.

Q. Did I understand you to say that Mr. Bill Schaefer was along then, too?

(Testimony of Sam Macri.)

A. As I recall, Bill Schaefer was the first and second time with his brother.

Q. Well, was Mr. Bill Schaefer there when the contract was signed?

A. My mind isn't fresh enough for that.

The Court: I couldn't hear that.

A. My mind isn't fresh enough on his brother over there when we signed the contract.

Q. Well, I understood you to say on direct examination that he was there; if you don't remember, say so.

A. I know his brother came in the first and second time, when he come in first and took the plans and specifications. [1782]

Q. That's the first time?

A. That's the first time, yes. I think his brother was with him the second time, with him, too, when we talked about the price.

Q. Bill Schaefer was there the second time, when you talked about the price, then?

A. Yes, seems like he was.

Q. Now, was he there when the contract was signed?

A. Well, I don't recall, now, about the contract, because we went up to the other office to draw that contract. Mr. Schaefer was over there and we went over there to prepare that contract.

Q. Mr. Schaefer wasn't there when you drew the contract, was he?

(Testimony of Sam Macri.)

A. Of course he was over there; he suggest everything; we both got together and say how you want to have it done.

Q. Well, you had the contract all prepared before Mr. Schaefer even saw it, didn't you?

A. No, not the first one, 1062. He was over there himself and dictate himself how he wanted to word it.

Q. Where was the contract signed on 1062?

A. I think it was signed right in the office over there, in the Stadium Home office.

Q. Isn't it a fact, Mr. Macri, that the contract on 1062 was signed out at your home? [1783]

A. No, in reverse. That's 1068 signed at my home.

Q. Do you remember when you came over to Yakima after 1062 contract was signed?

A. I come in Yakima.

Q. Yes; how soon did you come over to Yakima after signing contract 1062?

A. Well, I can't remember how soon it was.

Q. Don't you remember, Mr. Macri, signing this contract out at your home and then the next day that you rode over to Yakima with Mr. Schaefer?

A. That's the 1068 contract.

Q. No, on 1062.

A. No, sir, it was on 1068. Matter of fact, they got this on writing over there. He say if I want to go on the field job I have to pay the plane, and I told him I would let him know, so he come over,

(Testimony of Sam Macri.)

and that was signed at the house, if I remember right, I think it was on Sunday, but that was 1068.

Q. You say the contract on 1068 was signed on Sunday?

A. When he come in the house if I remember right it was on Sunday.

Q. So that 1068 contract was actually signed on Sunday?

A. I don't know if the contract was signed on Sunday, but I say, when he came in over there it was on Sunday.

Q. Well, is that when you signed the contract?

A. Or Saturday; I don't remember now. I know if it is when we're talking in the house.

Q. Well, you said it was 1068 signed at the house?

A. Yes, that's not 1062; it is 1068.

Q. And that was on Sunday?

A. Well, if I recall right it was on Sunday, either Saturday or Sunday.

Q. Well, was it Saturday or Sunday?

A. I think maybe it was—it seemed like it was on Sunday to me.

The Court: Well, perhaps we had better stop there and adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Friday, March 14, 1947, at 10 o'clock a.m.)

(Testimony of Sam Macri.)

Yakima, Washington, Friday, March 14, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination
(Continued)

By Mr. Olson:

Q. Mr. Macri, did you yourself have charge of sending the lumber to the job on 1062?

A. Well, charge in which way?

Q. Well, were you the one that would order the lumber and direct it be sent over, or did somebody do that for you?

A. Oh, when we got the order, why, there was a man on the job [1785] who take care of that.

Q. Well, somebody else did it, then?

A. Well, under my direction, yes.

Q. Your answer is yes, that somebody else did send the lumber over, besides yourself?

The Court: Under his direction.

Q. Did you or did you not, then, Mr. Macri, see the lumber that went over to 1062?

A. Well, when we ordered it through the mills, we just put an order on the mill and the trucks would deliver from the mill, and naturally I don't see it, no.

Q. So that you yourself did not personally see the lumber that went over?

A. We just put an order and deliver when we order the lumber.

(Testimony of Sam Macri.)

Q. Just answer the question; you didn't see it, then?

A. Some I did see, what we took from those jobs.

Q. And where did you see it?

A. Stock pile on the jobs, that we would use from those jobs.

Q. So that except for the lumber that you would see down on the stockpile on the job, you saw no other lumber?

A. We order from the mill, and the sawmill would deliver either from their trucks or some other trucks.

Q. Now, you say you told Mr. Stickney when he went on the job that if he ran out of lumber, to buy some locally?

A. Yes, sir. [1786]

Q. Now, isn't it a fact, Mr. Macri, that about September 9, 1944, you received a 'phone call from Mr. Stickney in which he advised you that a salesman from the lumber company at Klickitat was on the job, and he'd offered to ship you and deliver on the job ship-lap and two by fours, and that you told Mr. Stickney if there's any lumber to be gotten that you'd get it over in Seattle?

A. Mr. Stickney call up once and he said those people getting a little short on lumber now. I say "All right, we'll have a load delivered to them right away, but if they do need it short, why, see they get them over there locally."

Q. Isn't it a fact, Mr. Stickney called you up and made this statement to you that I just read,

(Testimony of Sam Macri.)

that there was a man—or just recited to you—that there was a salesman there from the Klickitat Lumber Company—— A. Which lumber?

Q. Klickitat. A. Klickitat?

Q. Yes. A. I never heard that name.

Q. ——and that you told him not to buy any locally; if there was any lumber gotten you would get it in Seattle?

A. No, sir; my order to everyone in charge was if you see they do run short of lumber, just see they get it over there. [1787]

The Court: Just answer the questions, Mr. Macri. You can answer that yes or no.

Q. You did not say that to Mr. Stickney?

A. No, sir.

Q. Now, as I understand from your testimony to Mr. Holman, you were on the job and met Mr. Schaefer out on the job some time in April?

A. Yes.

Q. And you think that was about the 20th of April; did I understand that correctly?

A. Around the neighborhood.

Q. Pardon?

A. Around the neighborhood; I don't mark the date, of course.

Q. Well, did you estimate it or give your best recollection as about April 20, the first time you met Mr. Matt Schaefer out on the job, in the field?

A. I said William Schaefer, not Matt Schaefer.

Q. Oh, you didn't meet Matt Schaefer about April 20, then? A. No, sir.

(Testimony of Sam Macri.)

Q. When did you first meet Matt Schaefer out on the job? A. That was on the 29th.

Q. On the 29th of April? A. Yes.

Q. That's the first time you met Matt Schaefer out on the job? A. On the field, yes. [1788]

Q. And was that a pre-arranged meeting?

A. Not as far as I know.

Q. Isn't it a fact that Mr. Staples, your then foreman, called you from your Sunnyside office, called you in Yakima and told you that if you didn't come down there that the Construction Company was going to pull off the job?

A. No, sir, Mr. Staples never tell me that.

Q. Pardon?

A. Mr. Staples never tell me that.

Q. Well, then, you state that you just happened to meet Mr. Schaefer down there on the 29th of April?

A. Well, that part of April I was quite a bit here in Yakima and if I recall right, Mr. Staples called me and said Schaefer's on the job, so I went over, and when I got in the office they told me Mr. Schaefer he was on the job, and I was looking for him.

Q. Then Mr. Staples did call you?

A. In Yakima.

Q. Yes. I say, Mr. Staples in Sunnyside called you in Yakima and told you Mr. Schaefer was on the job and wanted to see you?

A. If I recall right I think that's correct.

(Testimony of Sam Macri.)

Q. And he also told you if you didn't get down there Mr. Schaefer was going to pull his men off and go home? [1789] A. No, sir.

Q. Then you did go down, then, on the job, pursuant to that 'phone call, and met Mr. Schaefer?

A. I would go on the job just the same, because I was living in Yakima then.

Q. Now, relate just as nearly as you can, Mr. Macri, and slowly, just what was said on that date.

A. Well, when I went over there, in fact, when I went in the office, I sent a truck and driver to get hold of Mr. Staples to come in over there, that there was one structure that was over-dig, and I went with my car and Mr. Staples arrived the same time I did, and Mr. Schaefer mentioned, he pointed me out that structure was kind of over-dig, which wasn't finished yet. I said "That's all right, we'll fix for you." Then he show me the other, where there was just a small structure on a rock. He said this one here, he had his form made already, he said it was a little too tight. I said "Yes, it is a little too tight, but I don't think on the rock, that won't put you out too much." He said that part's all right. He said "We like to have some of those structures fixed right." I says "All right, we'll fix for you," and there wasn't much said then, and I told Mr. Staples be sure from now on everything be correct. That's about all that was said then.

Q. That's all that was said?

A. That's about all that was said then.

Q. And who was there then?

A. Well, Mr. Schaefer was there.

(Testimony of Sam Macri.)

Q. That's Matt Schaefer, M. C. Schaefer?

A. Yes, and of course Mr. Staples was there, and if I remember right Mr. Waltie was over there.

Q. How about Bill Schaefer, was he there, too?

A. I think he was over there, if I remember right.

Q. Well, then, on that day there wasn't anything particular, no particular complaints made, just that a couple of structures were a little off?

A. That's all the complaining he made with me that day.

Q. All right, when was the next time you were there and met Mr. Schaefer on the field?

A. Well, the next time was in June. They say June 15; I guess it's all right. That's the next time I met him over there.

Q. Now, that time was an arranged meeting, was it not?

A. Yes.

Q. And your recollection is that you called Mr. Schaefer?

A. I did.

Q. Isn't it a fact Mr. Schaefer called you?

A. No.

Q. Do you have your long distance telephone records, toll [1791] sheets, here with you?

A. Pardon?

Q. Do you happen to have with you the records of your telephone calls?

A. No.

Mr. Holman: They were not demanded.

Q. Well, I can ask him if he's got them here. You do not have them here?

A. I got them, yes.

(Testimony of Sam Macri.)

Q. I say, you don't have the records here?

A. No.

Q. All right, then, you arranged over this telephone call to meet Mr. Schaefer on the job?

A. Yes, I told him he better come himself here, yes.

Q. And how many men did you have working on the job then? A. In June?

Q. At the time you had this meeting in June, June 15, '44?

A. Oh, I had the shovel working; I can't say offhand.

Q. Well, the shovel was sitting in the yard, wasn't it, Mr. Macri, when you got there on June 15?

A. No, we had two shovels. One was working overhaul, and the other was working. We had two shovels then.

Q. You had one shovel being overhauled?

A. Yes, we rent one, and the other one was my own, and I kept him over there until it was overhauled. [1792]

Q. So on June 15 you had one shovel working and one in the yard under repair, is that right?

A. Well, I can't say the particular day, but we can look through the records, the payroll.

Q. Is it your testimony you don't know?

A. It was always one shovel on the job. I never let one go until the other one was fixed.

Q. Well, you were over there on June 15.

A. Yes.

(Testimony of Sam Macri.)

Q. Well, wasn't your shovel broken down and in the yard that day you got there?

A. We had one in the field, one we rent.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: Do you understand the question?

A. Yes; we had one, our shovel, overhauled in the yard.

Q. Now, did you also see another shovel that day out working?

A. We rent another shovel.

Q. Mr. Macri, my question is, did you see on June 15, 1944, another shovel out on the job in operation?

A. On June 15 I don't go in the field where the shovel was.

Q. All right; then you didn't see it?

A. Naturally I didn't see it that day.

Q. All right. Now, on June 15, that's the day that you met [1793] Mr. Matt Schaefer and Mr. Hunter and Mr. Waltie from the Concrete Construction Company, is that true? A. Yes, sir.

Q. And you had Mr. Cohen with you?

A. Yes, sir.

Q. And then you went out on the field?

A. Yes, sir.

Q. And what took place that day? What was said and what was done?

(Testimony of Sam Macri.)

A. Well, that day when we went over there Mr. Schaefer say that some structures wasn't done right. I told him "If they're not right, we make it right," and of course I don't know what his point was. He started to say "I got to have 100 structures"; that's all right, we'll give you a hundred structures, and also he say there's some of our man did some work they are not supposed to do. I said "Well, in case they did, why, that's done, send a bill, I'll pay you for it."

Q. Anything else said?

A. With Mr. Schaefer that's about all that was say, and Mr. Hunter, his bond man, spoke about it; he say "You know, a sub-contractor always do a little squawking about it." He say "That's small stuff, I don't see nothing to worry about." I say "Far as I'm concerned, I want to cooperate 100 per cent with the sub-contractor, that's all I can do; [1794] anybody can make a little mistake on construction, always not perfect." He says "I understand that." Far as I know we left friendly, that's all I know.

Q. That's everything you can remember that was said on that day, June 15, 1944?

A. That's about all that was say.

Q. Mr. Schaefer said that he needed more structures to work on, is that right, needed 100, I think you said?

A. Well, yes, he tell me, and he tell Mr. Staples, too, he want 100. I said we'll give him 100, if he want 100.

(Testimony of Sam Macri.)

Q. He also told you he couldn't start to work with the crew and pour concrete until he did have that many ahead?

A. He don't say he can't start to pour, because I know better than that.

Q. Never mind what you know. I'm just asking what he said. He didn't say that? A. No.

Q. He just said he wanted 100 structures?

A. Well, that's what he say, he wanted 100 structures ahead.

Q. He didn't say why?

A. He don't tell me why.

Q. And he said his men were doing some work that they weren't supposed to do?

A. He said they did already.

Q. He said they had done some work they weren't supposed to [1795] do? A. Yes.

Q. Did he tell you what work?

A. Oh, he said they did some digging on the structure. He said "On one structure one of my men did a couple of hours on one structure." I says "All right, I'll pay for that."

Q. You didn't tell Mr. Schaefer to write you a letter on that?

A. I said "Mail me a bill, and I send you a check."

Q. You didn't tell Mr. Schaefer to write you a letter about the excavation he was doing?

A. I told him mail a bill, and I'll send a check.

Q. And that's all you said?

A. That's all I said.

(Testimony of Sam Macri.)

Q. And then the conversation was all over with and everybody left friends?

A. Yes, I think so.

Q. You came all the way from Seattle and brought an engineer with you, Mr. Schaefer and Mr. Hunter and Mr. Waltie came all the way from Portland to get up on the job, and that's all that you said?

A. Well, when we talk on the 'phone he says he's going to bring his bond man, and I told him all right.

Q. No, I say that's all that was said on the job, that you related? [1796]

A. That's all that was argument and complaint, that I heard.

Q. Now, Mr. Macri, when did you first remember about this April 29 meeting that you testified to on direct examination and also on cross-examination? A. When did I remember it?

Q. Yes, when did you first start to remember that meeting?

A. Well, after I heard here talking about it.

Q. Well, now, again referring to when your deposition was taken over in Seattle in your attorney, Mr. Holman's, office, you recall that Mr. Schaefer's deposition was taken first, do you not?

A. Yes.

Q. And you remember him testifying about a meeting on April 29 and one on June 15?

A. Yes.

Q. You heard that?

A. Yes.

(Testimony of Sam Macri.)

Q. And that took place before your deposition was taken? A. Yes.

Q. And didn't you then testify that you didn't remember anything about an April 29 meeting?

A. I said about an appointment.

Q. What?

A. I meant an appointment, it was not by an appointment.

Q. Well, let's see what you meant. [1797]

Mr. Holman: Give me the page when you read, counsel.

Q. Yes, I will. Page 40—I'll go back to the 23rd line of page 39, Mr. Holman, to get the continuity. I'm reading now, Mr. Macri, from your deposition:

“Question: Mr. Schaefer started the job on the 14th of March?

“Answer: He didn't start then.

“Question: He signed his contract then?

“Answer: Yes, sir. But he has to build his forms and make preparations. He didn't go on the job until the latter part of April.

“Question: How long after that was it approximately that you had this meeting with Mr. Schaefer on the project?

“Answer: Well, I think it was in June; I imagine it was around in June. It wasn't in the summer.

“Question: And that is the time you referred to that Mr. Schaefer showed you two of these structures and complained about them?

“Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: And you referred to a third?

“Answer: That is the time.

“Question: That is the only time you can remember of meeting Mr. Schaefer out on the project?

“Answer: I met him once before when he was with somebody else. He came in the office.

“Question: But when you had a conference with him you remember only one time, and you think it was in June?

“Answer: I think so.

“Question: You heard Mr. Schaefer testify about this April 29th meeting with you out on the project?

“Answer: Yes, sir; I heard.

“Question: You don’t remember that at all?

“Answer: No. I don’t recall. I talked with his man over there.

“Question: You don’t remember meeting Mr. Schaefer that first time at all on the project?

“Answer: If I recall right I only met him that time.”

And then referring to the questioning by Mr. Holman—I’ll ask you first, did you so testify, Mr. Macri? A. Beg your pardon?

Q. Did you so testify, as I have just read to you, over in Mr. Holman’s office, when your deposition was taken? A. Yes, I did.

Q. And you didn’t remember the April 29 meeting over there in Mr. Holman’s office?

(Testimony of Sam Macri.)

A. I thought it was for an appointment, the way I thought then.

Q. Pardon?

A. The way I thought, for an appointment.

Q. The way you thought, it was an appointment?

A. Yes, that's the way I understood it, and it was just in June where we made an appointment.

Q. When I asked you the question: "You heard Mr. Schaefer testify about this April 29th meeting with you out on the project? Answer: Yes, sir; I heard. Question: You [1799] don't remember that at all? Answer: No, I don't recall. I talked with his man over there." You say that's what you meant, was you were talking about an appointment?

A. Yes, that's the way I took it that time.

Q. That's the way you took it. Now, referring to page 59 and 60, this is questioning by your own attorney:

"Question: Is it or is it not a fact at or about that date, April 29, 1944, was the first time Mr. Schaefer was on the job for the purpose of inspection and starting work? Was it at about that time?

"Answer: He sent his brother and a young man—I don't know his name, and a couple of men from Portland. I never called to see Mr. Schaefer then."

(Testimony of Sam Macri.)

Did you so testify?

A. You mean on the same day I talked with this boy?

Q. I'm just asking you if you said the words which I have just read, at the time your deposition was taken in Mr. Holmans' office in Seattle.

Mr. Holman: Give me that page.

Q. That's the bottom of 59 and the top of page 60. I'll read it again, Mr. Macri; you listen. This is a question asked by Mr. Holman:

“Question: Is it or is it not a fact at or about that date, April 29, 1944, was the first time Mr. Schaefer was on the job for the purpose of inspection and starting work? Was it at or about that time?

“Answer: He sent his brother and a young man—I don't know his [1800] name, and a couple of men from Portland. I never called to see Mr. Schaefer then”.

A. I meant at that time when his brother was over there.

Q. You said that, did you, Mr. Macri, what I just read?

A. If it is in there, I must have.

Q. (Continuing the reading from the deposition)

“Question: You would say that you did not see Mr. Schaefer on the job in April, 1944?

“Answer: There was his brother over there, and a young man.

(Testimony of Sam Macri.)

“Question: Did you see Mr. Schaefer?

“Answer: I don’t recall at that time.

“Question: I am asking you definitely to say yes or no, because Mr. Schafer said positively just what I have read to you, that he was there on the job and said he would pull off. Is that true or false?

“Answer: He never said that to me.

“Mr. Bullivant: The question has not been answered. Did he see Mr. Schaefer on the job in April, 1944. That question has not been answered, and I insist that it be answered” Mr. Bullivant represented Mr. Schaefer in Portland, and also did some preliminary assistance on this case. He’s Mr. Schaefer’s counsel in Portland.

“Question: Do you know?

“Answer: All I remember meeting Mr. Schaefer is that time.

“Question: The time in June or in April?

“Answer: I can’t say which month it was, but that time when he had his insurance man with him”.

Did you so testify? [1801]

A. I guess I did, if it is over there, but my point was, the way I took it, just for an appointment.

Mr. Olson: I ask that be stricken.

Mr. Holman: I join.

Q. (By Mr. Olson): I’m just asking, Mr. Macri, did you so testify? A. I did, but——

(Testimony of Sam Macri.)

Q. Thank you; and continuing:

“Question: Well, can you answer whether or not Mr. Schaefer was on that job with you in April, 1944, he having signed the contract in March? I mean by Mr. Schaefer Mr. M. C. Schaefer, the gentleman who is here.

“Answer: I only remember once of being in the field with him.

“Question: That is the time about which you answered Mr. Olson?

“Answer: Yes, sir.”

Did you so testify? A. Yes.

Q. So that when your deposition was taken over in Seattle you only remembered meeting Mr. Schaefer out in the field the one time, and that was when his insurance man was there?

A. I meant by appointment; that's what I meant.

Q. You did remember more times, then, did you, over in Seattle? A. Beg your pardon?

Q. I say, when you were over in Seattle you remembered that [1802] April 29 meeting, when we took your deposition in Seattle?

A. Well, if I didn't have my mind freshened I would say no.

Q. Mr. Macri, when we took your deposition over in Seattle did you then remember this meeting you had with Mr. Schaefer on April 29, 1944?

A. That time I only recall one meeting, once.

(Testimony of Sam Macri.)

Q. Now, Mr. Macri, either you did remember it or you didn't. That's all I want to know. Did you remember it then, or did you not? A. No.

Q. You didn't remember it then?

A. Not then.

Q. And that was right after you had heard Mr. Schaefer tell you all about it?

A. Well, I wasn't positive of that particular day.

Q. You weren't posted about it?

Mr. Holman: Oh, I object to that.

The Court: I didn't understand that.

Witness: Positive.

Q. I'm sorry.

Mr. Holman: I'm just objecting to "posted".

Q. I thought he said posted. You said you were not positive about it? A. That day. [1803]

Q. But you had just sat there, had you not, Mr. Macri, and heard Mr. Schaefer testify in detail to the conversation and the date and in whose presence, about the April 29, 1944, meeting?

A. Yes, but when I'm not sure I don't like to make a statement.

Q. I see. Now, you say that you were out to the job on a Saturday afternoon with Mr. Klugg, I think you said, and Mr. Mercelle, and went out and checked 75 different excavations?

A. Yes.

Q. Or I think you said 75 structures?

A. Structures.

(Testimony of Sam Macri.)

Q. Was it 75 different excavations, or was it 75 structures?

A. No, there was 75 structures.

Q. And on what laterals were you on, or which lateral?

A. Oh, I started over there from the beginning, I think it was 59, the first lateral.

Q. The first lateral? A. Yes.

Q. Any others?

A. I can't recall. Mr. Klugg I guess can tell you more about it than I do.

Q. Well, if you don't know, say so.

A. We went on the beginning of the job, along the line, the first lateral, and go on. [1804]

Q. You were right there with Mr. Klugg and Mr. Mercelle? A. Yes.

Q. And you're the contractor that had this job, are you not, on 1062? A. Yes, I am.

Q. And you know where the laterals are, don't you? A. I know.

Q. I'm asking you, then, what lateral or laterals did you inspect these 75 structures on?

A. Well, it was on the beginning of the job, on 59.3, I guess, the first lateral, and we went down the line over there.

Q. Would you like to see a map, Mr. Macri, to answer that question?

A. Mr. Klugg and Mr. Mercelle is the one that drove the truck over there; I didn't have a map or nothing.

(Testimony of Sam Macri.)

Q. Do you know what laterals you were on?

A. I know Mr. Klugg took me to the first lateral, and we went to the structure, one to one.

Q. I'll show you your own exhibit, Mr. Macri, being Exhibit 75, and ask you if you can tell by looking at this map——

A. I don't know; probably I can.

Q. ——which lateral you were on. Was it the first lateral, Mr. Macri?

A. Yes, it was the first one. We took the truck over there. [1805]

Q. Well, that's lateral 59.3, is it not?

Mr. Holman: I'll stipulate that it is, counsel, if that will save time.

The Court: The first lateral is 59.3.

Q. I don't see why Mr. Macri doesn't know that. Isn't that true, Mr. Macri, you were on the first lateral?

A. Yes, I was; Mr. Klugg took us over there himself.

Q. On the first lateral, 59.3? A. Yes.

Q. About when was this that you were out on this lateral?

A. Oh, that was around the first part of June.

Q. Around the first part of June?

A. Yes.

Q. And did you examine any excavations on any other laterals, or was it all on this one?

A. I went over with their own men.

Q. I know you did, but where did you go? Was it all on this first lateral?

(Testimony of Sam Macri.)

A. Well, down the line, drive down with the truck.

Q. And all on this one lateral?

A. Well, after we get through with that, we must have jumped to the next one.

Q. Well, did you?

A. Just travel along on the truck, yes. They drove the truck. [1806]

Q. I'm not asking who drove; I'm just wondering whether you examined all the structures on 59.3, and then you examined the structures on any other lateral.

A. Mr. Klugg did the examination, not me.

Q. You don't know?

A. I wanted him to go ahead and tell me that they were all right.

Mr. Olson: I ask that be stricken.

The Court: Let it be stricken.

Q. If you don't know tell me so, and I'll quit asking.

A. We went down the lateral, and they drove the truck.

Q. Do you know what lateral you went down?

A. Started at one, right down the line, yes.

Q. How far did you go, how many laterals, up to those 75 structures?

A. Well, it was the first and second.

Q. Is that what you did, the first and second lateral?

A. And part of the second, I imagine.

(Testimony of Sam Maeri.)

Q. I don't want what you imagine, Mr. Maeri.

A. The first lateral was probably only 25 or 30 structures.

Q. Never mind how many on the lateral. I'm asking you from your own recollection of being out on the job, and being the contractor on the job, what laterals you were on when you examined those 75 structures.

A. Well, first and part of the second. [1807]

Q. All right. Now, do you know how many different excavations you examined on the second lateral?

A. I never marked each lateral. I just marked as we went along.

Q. Do you remember how many you examined on the second lateral?

A. No, only what I've got marked on the slip of paper.

Q. That's all you know, what you've got marked on the slip of paper?

A. Yes.

Q. And by that you refer to this identification 77?

A. Yes.

Q. All you know is what is marked on that slip of paper?

A. Just make a note.

Q. Is that all you know about this examination, sir, what you see on this piece of paper?

A. I went and marked it down.

Q. And is that all you now remember about this examination, is what you have on this piece of paper?

A. Yes.

(Testimony of Sam Macri.)

Q. Your answer is "yes"? A. Yes.

Mr. Holman: I didn't get your answer, Mr. Macri.

A. Yes.

Q. Now, I'm referring to page 12 of your deposition, Mr. [1808] Macri, where I was examining you, I'll ask you if you did not testify as follows, with reference to these 75 structures; line 15:

"Question: You mean 75 structures, or structure number 75?

"Answer: No, we measured 75.

"Question: You mean 75 different excavations?

"Answer: I think his foreman did. I wanted to make sure they had it exactly right, and Mr. Schaefer have nothing to say any more, and we measured 75 there, and his truck driver, and he can't deny it.

"Question: You measured 75 different excavations?

"Answer: His own foreman did.

"Question: Is that correct?

"Answer: Yes; I was along with them, yes.

"Question: Were those 75 excavations that had structures in them already?

"Answer: No, they were ready to put the forms in.

"Question: They were 75 excavations ready to have the forms put in?

"Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: Did you make any record of that inspection?”

“Answer: I mark it on a piece of paper, but I can’t find it, and Klugg is a witness, and his truck driver.

“Question: Have you that paper with you?”

“Answer: No.

“Question: Where is it?”

“Answer: It’s someplace.”

That’s the piece of paper you referred to as identification 77? A. Yes.

Q. Now, is it true, Mr. Macri, like you said in your deposition that I just read, that you examined 75 different [1809] excavations, or it is 75 structures, like you said here in court?

A. Structures.

Q. And not 75 different excavations?

A. I’m talking about the structures.

Q. Pardon?

A. I’m talking about the 75 structures.

Q. What time did you go out that Saturday, in the morning, or the afternoon?

A. It was during the morning.

Q. Pardon?

A. That was during the morning, if I remember right.

Q. It was early in the morning?

A. Toward in the morning, I said; before noon.

Q. Oh, before noon, towards the morning?

A. Yes.

(Testimony of Sam Macri.)

Q. Do you know about what time it was at all, or can you remember?

A. No, I don't remember exactly the time.

Q. Did you have lunch out in the field?

A. No.

Q. How long were you out there?

A. Oh, I must have been over for a guess, around three hours, I guess, a little better.

Q. Around three hours? [1810]

A. Yes, maybe more; I can't say exactly.

Q. Do you remember when you came in? Did you come in at noon, or——

A. No, I think it was toward the afternoon when we got through.

Q. As I recall, you said something Mr. Klugg said it's time to quit?

A. Oh, he said it's time to go home.

Q. Well, was that at noon on Saturday?

A. It was toward the afternoon.

Q. Matter of fact, Mr. Macri, you don't remember much about this trip at all, do you, this inspection trip?

A. I do remember it, yes.

Q. You took no measurements yourself?

A. Klugg did.

Q. Klugg took them? A. Yes.

Q. So all you know about it is what Mr. Klugg told you?

A. Well, it was his men.

Q. I say, all you know about it is what Mr. Klugg told you?

A. Klugg told me they're all right.

Q. And that's all you know about it?

A. I took his words for it.

(Testimony of Sam Macri.)

Q. Now, referring to plaintiff's Exhibit 5, which is the sub-contract between yourself and Mr. Schaefer on job [1811] 1062, as I understand it, you said, Mr. Macri, that this part of the bottom of page 1 which is the third page but marked page 1, the bottom of the typewritten matter that's X'd out, that that was X'd out after Mr. Schaefer had said that he was not going to furnish the form lumber. Is that your understanding of it, or is that the way it happened?

A. It was took out before it was signed, the contract.

Q. But you said, did you not, Mr. Macri, that at first Mr. Schaefer was going to furnish the lumber, and you drew the contract up that way, and then when it was decided he would not furnish the lumber, then this line was X'd out; isn't that what you said?

A. Well, there's nothing said about the lumber; he was going to furnish himself, first, and then I—

The Court: Read the question and see if he can answer. Answer the questions, if you can.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: Just a minute, your Honor. I take it you mean here in Court?

Mr. Olson: I am referring to here in court, in response to direct examination.

Q. (By Mr. Olson): Did you say that, Mr. Macri?

(Testimony of Sam Macri.)

A. About the lumber, there was some correction, where Mr. [1812] Schaefer don't like it.

Q. Well, if you don't remember what you said before, Mr. Macri, tell me now; and I'm referring to page 1 of the sub-contract, plaintiff's Exhibit 5; what are the circumstances of that first type-written line at the bottom of the page having been X'd out?

A. Well, that was for steel; why, the government furnished the steel, and him or I won't need to furnish the reinforced steel.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Mr. Olson: I ask that it be stricken, your Honor, as not being responsive.

The Court: Well, I understand that's his explanation of why that was X'd out; isn't that what you're saying?

A. Yes.

The Court: That's in answer to the question.

Q. Then the X'ing out of that line had nothing to do with who was going to furnish the lumber?

A. Not that line that's scratched out, no.

Q. Now, didn't you tell Mr. Holman a while ago on direct examination that the reason that line was X'd out was because it was decided that you would furnish the lumber, [1813] instead of Mr. Schaefer?

A. I said there was some words added to that contract about the lumber.

(Testimony of Sam Macri.)

Q. Well, then, Mr. Macri, the changing or the X'ing out of that portion of the contract had nothing to do with who was to furnish the form lumber?

A. Not when the contract was signed.

Q. I say, it had nothing to do, it wasn't scratched out because of any change in agreement as to who was to furnish the form lumber? A. No.

Q. Now, handing you defendant Macri Exhibit 76, Mr. Macri, was one of those vouchers attached to each check that you sent the Concrete Construction Company? A. Yes.

Q. Do you have with you, Mr. Macri, the checks that were paid the Concrete Construction Company? Do you have them here with you?

Mr. Holman: I have them at the hotel, complete. I can have them this afternoon.

Mr. Olson: I wish you would have them here.

Mr. Holman: Yes, I will do the same as you did with Mr. Hendershott.

Mr. Olson: I am particularly asking about the checks that were sent with the letter dated April 28, 1945, in the amount of \$7,050.50, and the check sent——

Mr. Holman: Will you give me that amount?

Mr. Olson: \$7,050.50, and one for \$2,985.46 in February, I think, 1945.

Mr. Holman: Do you have the letter?

Mr. Olson: Well, it apparently wasn't sent with a letter.

(Testimony of Sam Macri.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. But you never sent a check unless it had one of these vouchers attached to it?

A. I was going to say, yes, there's two or three checks we run out of those checks, and we used a different check.

Q. So all of your checks didn't have these vouchers attached to them, did they, all of your remittances to the Concrete Construction Company?

A. All but a couple; we run out of those checks and we used the regular check.

Q. Well, aren't these checks your regular checks, that have these vouchers attached to them?

A. Yes, but we ran out of them.

Q. So that the last checks you sent didn't have these notations?

A. I can't say if that's the last or first. There's a couple of checks we run out of those vouchers.

Q. Now, Mr. Macri, do you know when your payroll shows that [1815] you first had a fine grader on this job 1062?

A. I think it does show, yes.

Q. Pardon?

A. I think the payroll shows.

Q. Now, showing you Macri's identification 15, Mr. Macri, and directing your attention to the payroll of Macri and Company for the week ending November——

(Testimony of Sam Macri.)

Mr. Holman: It shows up there at the top. May I help you?

Q. I want to get November 16—for the week ending November 22, 1944, there is a fine grader appearing on that payroll, is there not?

A. Yes.

Q. All right; now, will you please point out where a fine grader—well, strike that—isn't that the first time, Mr. Macri, that you ever had a fine grader shown on your payroll?

A. First time?

Q. Yes.

A. You mean the words "Fine grader, James Black" you mean?

Q. I'm asking if that isn't the first time you ever show a fine grader on your payroll on 1062.

A. We got a regular laborer we don't call a fine grader.

Mr. Olson: I ask that be stricken as not being responsive, what he calls them. I asked what is shown on [1816] his payroll.

The Court: Answer the question if you can.

Q. Isn't that the first time that you show on your payroll a fine grader on job 1062?

A. Well, they make this payroll on the job. I can't say how they classify their men, but this labor, that's all they do, work on that kind of stuff.

Q. I ask you, Mr. Macri, isn't it a fact on the week ending November 22, 1944, is the first time that your payroll shows a fine grader on this job?

(Testimony of Sam Macri.)

Mr. Holman: I object to that question unless counsel gives him a chance to go through the payroll.

The Court: Well, he can answer if he doesn't know.

Mr. Olson: I'm not restricting him on that.

Witness: Well, as I say, we had a man to do fine grading at the beginning of the job.

Q. Well, if you had one on, he didn't show that way on your payroll before, did he?

A. A. J. Black was a fine grader; he's supposed to be specified.

Q. And that's the day he went to work for you on that week?

A. If it's shown here that he did.

Q. Well, I want to know, isn't that the week he first started working for you?

A. J. A. Black? [1817]

Q. Yes, and the week ending November 22, 1944, is the first week that Mr. Black went to work for you on this job 1062? A. Yes.

Q. And you don't show on your payroll any fine grader before that time, do you?

A. Well, the superintendent hire all those help, and if he don't want to classify as a fine grader, I can't help.

The Court: Do you know, or don't you know, if there is a fine grader on the payroll?

A. Well, I can't tell until I go over that.

The Court: That's the answer.

(Testimony of Sam Macri.)

Q. You don't know?

A. Not until I go over that.

Q. Well, not right now, but would you check that, and see whether you have a fine grader any other time, or any prior date, on your payroll? Would you do that, Mr. Macri?

A. All right.

Q. Now, on this June 15 meeting, you told Mr. Schaefer that if there was any extra work—are you listening, Mr. Macri? A. Yes.

Mr. Holman: Just a minute; your Honor, I submit he's asked him to look through the payroll, and now he's shooting questions at him.

The Court: He said not now, but later. [1818]

Mr. Olson: Well, I have no objection to him doing it now. How long would it take you?

Mr. Holman: I don't want to invoke counsel's rule of employing people to look at it during the recess, but I want him to do one or the other.

The Court: Well, I understood him to say he wanted him to examine it, not now, but later. I think probably Mr. Macri mis-understood him.

Mr. Olson: I'm going to be through in just a few minutes.

The Court: Well, we'll recess for five minutes. Maybe he can look through the payroll during that time.

(Short recess.)

(Testimony of Sam Macri.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Have you had an opportunity to look over his payroll? A. Yes, sir.

Q. And do you find a fine grade man on there before that week I spoke of?

A. Just A. J. Black is the one I can see there.

Q. He's the only one you can see?

A. That's classified as a fine grader.

Q. And you find no other fine grader appearing on your payroll prior? [1819]

A. You mean that qualifications, as a grader?

The Court: He means, I presume, under that name.

A. Yes, sir.

Q. Now, Mr. Macri, showing you plaintiff's Exhibit 12, page 65, and drawing your attention to structures 427 and 428, can you tell me by an examination of that structure, speaking of the 427-428 structure, how far it is from the—or how deep it is from the top of the wall to the floor of the invert in the portion of the structure located in the upper left portion of that diagram?

Mr. Holman: Just a minute. Your Honor, I object to this as improper cross-examination unless it is for the purpose of testing Mr. Macri's ability

(Testimony of Sam Macri.)

to read the plans. There's nothing brought up in the direct regarding that structure, or any other structure.

Mr. Olson: Well, that's the purpose of it.

Mr. Holman: If it is for the purpose of testing, I naturally don't resist.

The Court: Overruled.

Q. (By Mr. Olson): Can you tell me how far it is? A. The elevation?

Q. I want to know how far it would be from the top of that wall to the floor of the excavation, or floor of the concrete invert.

A. Well, it is a 975, 66—— [1820]

Q. Well, you're referring to the wrong one. I'm speaking of structure 427-428.

Mr. Holman: Those are two structures. Which one, counsel?

Mr. Olson: Well, they're two structures, but they're in the one excavation. I'm referring to 427.

Mr. Holman: Are you asking about the excavation, or the structures?

Q. (By Mr. Olson): How far is it from the floor of the invert located in the—the deepest invert on structure 427 to the top of the wall?

A. You mean one by one, here, or——

Q. Speaking about the portion of the structure that's in the upper left hand corner of the diagram, the one I've got my pen on.

Mr. Holman: Would you give me that page?

Q. On page 65; now, how far is it from the floor of the invert to the top of the wall?

A. Well, the work here is 979.

(Testimony of Sam Macri.)

Q. Do you want some paper and a pencil?

A. No, I don't need it.

Q. Just tell me in feet. A. Huh?

Q. Just tell me the feet.

A. You mean the depth, or what? [1821]

Q. Yes, the depth from the top of the wall down to the floor of the invert. Do you know how to figure it, Mr. Macri?

A. Oh, I'm not too expert on this kind of stuff, figures, no; I'm not qualify as an expert.

Q. In other words, you can't figure that?

A. Well, if I get your point I probably can.

Q. Well, maybe I better make myself clear. Do you know what the floor of the invert is? Do you know what this "Inv" refers to, on that structure 427?

A. Yes, that's the invert.

Q. That's the invert; all right. Now, that's surrounded by two lines which have some figures on it. What does that indicate? Well, here, Mr. Macri, I'll put my pen right on it, 427, page 65, of this exhibit.

A. Yes.

Q. And I'm asking you how far it is from the floor of that invert to the top of the wall that surrounds it. Now, if you don't know, and can't figure it, well, tell me, and we'll leave it.

A. You want to know how deep it should be?

Q. I want to know the answer to the question I just asked you. If you don't know the question we'll have it re-read to you. Are you unable to tell me the answer to that question from that diagram, Mr. Macri?

A. No. [1822]

(Testimony of Sam Macri.)

Q. All right, thank you. You've been in the construction business for how many years, did you say, Mr. Macri? A. Around 26 years.

Q. Huh? A. Around 26 years.

Q. Did you ever have a job of this type that was on 1062, before?

A. Not this structure, no.

Q. Well, of this type of structure?

A. I say no, it's the first one I had.

Q. And you aren't able to look at the structure lay-out plan and figure the elevations, are you, as shown right on the plans?

A. No; I had a minute to do it.

Q. So that when you went out to look at the job and looked at these excavations, you weren't able to tell anything about whether or not they were to sub-grade, or whether they weren't, were you?

A. With the men I got on the job, yes.

Q. As far as you yourself was concerned you don't know how to figure it?

A. Every contractor has their superintendent.

Mr. Olson: I ask that be stricken.

Mr. Holman: I join.

The Court: It will be stricken. [1823]

Q. As far as you yourself was concerned, Mr. Macri, you didn't know how to figure it, did you?

A. Figure?

Q. To figure whether or not the floor of the excavations was to proper grade or not?

A. When we figure jobs we don't figure those things ahead of time; we do that while we go along with construction.

(Testimony of Sam Macri.)

Mr. Olson: I ask that be stricken.

The Court: I doubt if he understands the question.

(Whereupon, the reporter read the following:

“Question: As far as you yourself was concerned, Mr. Macri, you didn’t know how to figure it, did you?

“Answer: Figure?

“Question: To figure whether or not the floor of the excavations was to proper grade or not?”)

Witness: You mean when we figure the jobs, or when we do construction work?

Q. I’m asking if you went out and looked at an excavation, you, yourself, are unable and were unable to take these plans and specifications and this excavation and tell whether or not it complied with the plans and specifications and the structure layout plan; you, yourself, without any help?

A. Myself, personal, I never measure one anyhow.

Q. And you don’t know how to do it?

A. Probably when it was staked out I could measure it all [1824] right.

Q. He said when it was staked out, I think. But you, yourself, without some help from somebody, don’t know how to do it; that’s true, isn’t it?

A. Yes.

(Testimony of Sam Macri.)

Q. Mr. Macri, isn't it a fact that you saw George Schuler and Fred Waltie actually excavating one of these structures out in the field, one of the excavations, I mean?

A. I don't recall; I don't know who is this George Schuler you mentioned about.

Q. Well, isn't its a fact that you saw two men, at least one time you were out on the job, actually digging, of the Concrete Construction Company's men?

A. Well, I don't know what you mean, digging, now, because when they set the forms they probably level off some; I don't know about it.

Q. Didn't you see them, Mr. Macri, down in the hole, two men with shovels, and diggings?

A. No.

Q. You didn't see it? A. No.

Q. On Structure 18?

A. Well, structure 18, if it is the one by the road, the one they been making so much complaint, I sent my superintendent to fix for them. [1825]

Q. I'm asking if you did not stand right there at structure 18 and see Mr. Waltie or Mr. Schuler or two men who were not your employees, but employees of the Concrete Construction Company, see them digging in the hole? A. No, I didn't.

Q. Mr. Macri, weren't you standing right there when Mr. Schaefer told them to get out of the hole and to quit excavating? A. I don't recall.

Q. You don't recall? A. No.

(Testimony of Sam Macri.)

Q. You heard Mr. Waltie testify to it here in Court?

A. I heard a lot of testimony here in court, all right.

Q. Well, you heard him testify as to that specific structure?

Mr. Holman: I didn't get the answer.

The Court: He didn't answer yet.

A. Well, I heard Waltie testify, but I don't recall the words he used.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Mr. Macri, reverting back to the first part of your cross-examination, will you tell me whether or not, if you recall, there was lumber delivered for use on 1062, schedule 1, after you delivered the lumber for the stilling pool? [1826]

A. Oh, yes.

Q. Sir?

A. Yes, there was some lumber delivered to that.

Q. After that? A. Yes.

Q. Yes, sir. Now, can you tell me why there was a delay between the time of the order for the stilling pool lumber and its delivery? What were the facts surrounding that?

A. Well, for one thing, they say they don't need that up to the end of the job.

Q. Now, wait a minute; you say "they said"; who said? A. Darcy.

(Testimony of Sam Macri.)

Q. Said he didn't need it until what?

A. Until the end of the job, because that's the last operation he's going to do, on the stilling pool.

Q. And what were you doing interveningly with respect to getting that order filled?

A. Well, I have to work pretty hard, because they wanted some flooring that was pretty hard to get in those days, so I placed an order in two or three mills, until finally they got it for me.

Q. And I'll ask you whether or not the order was filled at or about the time the delivery was made?

A. Oh, no; I placed the order during the summer.

Q. You didn't answer my question. I asked you if it was filled about the time you delivered it, or had you had the lumber for some time, and just held it at Seattle?

A. Oh, no; as soon as I got them I sent them.

Q. What difficulties did you have to go through in order to get that flooring?

Mr. Olson: That's objected to as being immaterial.

Mr. Holman: If your Honor please, counsel has asked for the time of the order's submission, and the time of furnishing, and let it stand there.

The Court: Overrule the objection.

Q. Tell the Court what you had to do, what you did do.

A. I went and placed the order in two of those responsible sawmills, until finally I got hold of

(Testimony of Sam Macri.)

these people in Everett, which is Walton Lumber Company, and I asked him if he can do a favor; more than anything else I know it was hard to get during the war; we were short even on defense homes. He says "Myself, personally, even a year from now I can't give it to you, but I'll get in touch with a couple of more mills and see if I can spare for you."

Mr. Olson: This is a conversation with who?

A. Walton Lumber Company.

Mr. Olson: Well, I'm objecting to that conversation. [1828]

The Court: Yes, I think that is improper, and may be stricken. He can tell what he did.

Q. I didn't ask what somebody said, I asked you what you did.

A. He went and got it for me then.

Q. Well, when?

A. Well, he was unable to get it until the first part of February.

Q. First part of what?

A. First part of February, I think it was.

Q. Of February, 19—what? A. 44—or 45?

Q. 1945? A. 1945.

Q. Now, is that the first time that you were able to get that at all?

A. That's the first time.

The Court: Is he testifying about the flooring now?

Mr. Holman: Yes, your Honor.

(Testimony of Sam Macri.)

The Court: Was the flooring used on the stilling pool?

Mr. Holman: That was the order Mr. Darcy sent in.

The Court: All right.

Q. (By Mr. Holman): Mr. Macri, counsel asked you if it wasn't a fact you changed engineers, from Staples to Stickney to [1829] Ashley to King; now, I'll ask you whether or not Mr. M. C. Schaefer had anything to do with the change of those engineers?

A. Yes, especially Mr. Ashley. He called my attention once, and he say——

Q. Well, first, let's start with Staples. Did he have anything to say with respect to Staples being discharged?

A. Yes, Mr. Schaefer told me once——

Q. Pardon me; in a conference, or by telephone, or what? How was it done?

A. Well, once when I start to met him to come in to work——

Q. Well, Mr. Macri, I want my questions answered just the way I'm asking you. Was it done by telephone, or was it done in a talk you had with him on the job, or in the office, or how was it done?

A. I told him on the telephone that particular time.

Q. All right; what was said, and when was that conversation?

A. Well, it was during the first part of June.

(Testimony of Sam Macri.)

Q. All right, sir; now what was said in that conversation?

Mr. Olson: Is this a conversation from Mr. Staples to you?

Mr. Holman: No, it is from Mr. Macri; Mr. Macri and Mr. Schaefer.

Mr. Olson: I thought you said Mr. Schaefer never called him? [1830]

Mr. Holman: I object to that, your Honor.

The Court: Yes, that will be stricken out.

Q. (By Mr. Holman): Did you call Mr. Schaefer, or did Mr. Schaefer call you?

A. I called Mr. Schaefer.

Q. All right, tell the Court what was said in that conversation about the engineer Staples.

A. Well, I told him why he don't come in and start to work, and he said "till you have that man on the job, that I don't feel like I want to pour any concrete."

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Q. I don't understand your answer, Mr. Macri.

A. Till Mr. Staples was on the job he don't feel like pouring concrete.

Q. You say "till he was on the job"?

A. Till he was on the job.

The Court: You mean so long as he was on the job?

(Testimony of Sam Macri.)

Q. Is that what you mean, as long as he was on the job he didn't want to pour? A. Yes.

Q. Then what did you tell Mr. Schaefer in that conversation?

A. I told him he better come over himself on the job, so we can straighten all this stuff out; I talked with some of [1831] your men and the structures are all right, and you claim they're wrong; you better come up yourself so we can straighten those things up. He says "All right, I'll bring my bond man," and I says "All right, I'll bring an engineer, and probably those things can be solved."

Q. All right, do you know about when that conversation was? I guess you've given that.

The Court: Early in June.

A. Early in June, I was there.

Q. Then later was there a date fixed, or did you fix a date of coming up at that time?

A. Yes, we fixed the date then.

Q. You covered your face and we couldn't hear a thing you said. A. I say "yes."

Q. In that telephone conversation, or later?

A. I think it was on some telephone we make an appointment to meet.

Q. Well, did you make an appointment then, or not?

A. Yes, we did, and we met over there.

Q. And what date did you recall you made it for?

A. Well, that's when they testified June 15, so I guess it is that time.

(Testimony of Sam Macri.)

Q. Now, what with respect to the engineer Ashley? What was said about him, if anything? [1832]

A. Well, after this was all over, I tell them all I can do now is just to bring an engineer on the job and to go ahead so they can go to work.

Q. I'll ask you whether or not you told them you were going to bring Mr. Cohen, and he was going to be the engineer?

A. No, I told them I bring an engineer on the job; I don't tell them Mr. Cohen.

Mr. Holman: I'll cover these witnesses, your Honor, so I'll not pursue that any further.

The Court: Well, if you haven't anything ready there, we'll recess now. I thought counsel might like to know that the Court does not plan to have any session tomorrow. We'll adjourn this case at 4 o'clock this afternoon until 10 o'clock Monday morning. The Court will recess now until 1:30.

Mr. Hawkins: Your Honor, I wonder if Mr. Goerig might be excused from being here this afternoon?

The Court: The Court has no objection, certainly, if counsel haven't. Does anyone have any objection to Mr. Goerig being excused?

Mr. Olson: No legal objection, your Honor. We'll miss him.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.) [1833]

(Testimony of Sam Macri.)

Yakima, Washington, Friday, March 14, 1947,

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may the record show that I am delivering at this time to counsel Olson, agreeable to his request before luncheon recess, Macri and Company check number 804 dated February 8, 1945, for \$1,626.40, together with a carbon of the face of that check as to amount and payee and date, and a detail as contained on the portion of the check which is not here, a carbon of that; also Macri and Company's check number 946 dated February 26, 1945, payable to the order of the Concrete Construction Company, for \$2,852.81, with similar carbons, plus an endorsement on the bottom that apparently has no—that isn't your endorsement, is it, Mr. Clerk?

The Clerk: No, sir.

Mr. Holman: —has no place in this case, which should be stricken, and Macri and Company check number 1185 dated April 28, 1945, for \$7,-050.50, for which I do not have a similar carbon. These are delivered to counsel, your Honor, with the request that in the event the checks themselves are admitted in evidence, that counsel be required to substitute photostatic copies, because they are necessary for the office accounting. Here you [1834] are, sir.

(Testimony of Sam Macri.)

Mr. Olson: Your Honor, as long as they're making statements for the record, may the record show that I have now returned to Mr. Holman the instruments which he delivered to me, the witness having subsequent to my request for them admitted that the vouchers which are in evidence were not attached to the checks.

Mr. Holman: I would like to express my gratitude to counsel for exhausting most of my noon hour, your Honor. That's all.

The Court: Well, let's proceed with redirect.

(Whereupon, Calendar for years 1944, 1945 and 1946 was marked Defendant Macri's Exhibit No. 84 for identification.)

(Whereupon, Order for lumber to Macri, July 25, 1944, was marked Defendant Macri's Exhibit No. 85 for identification.)

Mr. Holman: Your Honor, with consent of counsel and the Court, and for convenience of all parties, I have had a calendar for 1944 and 1945, and on the reverse side 1946, marked as an identification. If it is proper to be admitted it might be convenient.

The Court: Have you seen this identification 84, Mr. Olson? Do you have any objection to putting the calendar in, for convenience?

Mr. Olson: No, I have no objection. [1835]

Mr. Hawkins: Is that the calendar for 1944?

(Testimony of Sam Macri.)

The Court: As I understand it, it is the calendar for 1944 and 1945, with 1946 on the reverse of one of them.

Mr. Hawkins: No objection.

The Court: If there is no objection, then, defendant Macri's identification 84, the calendar, will be admitted in evidence.

(Whereupon, Defendant Macri's Exhibit No. 84 for identification was admitted in evidence.)

Redirect Examination
(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 85, I'll ask you if you will tell the Court how you received that, and what, if anything, it has to do with what you testified about lumber, Mr. Macri?

A. Yes, this is a list I received from Mr. Ashley, engineer, and he say this is the lumber required for stilling pool, which they cannot get locally.

Mr. Olson: I ask that that last answer be stricken, your Honor, as reading from the identification, as to what somebody else said.

(Whereupon, the reporter read the last previous answer.)

Mr. Olson: I think that last sentence.

The Court: I think the last should be stricken as [1836] hearsay.

(Testimony of Saml Macri.)

Q. (By Mr. Holman): All right, sir. Did you learn whether or not, through any of your superintendents or otherwise, if this material as shown on this list could be secured locally?

A. Yes, and they said they can't.

Q. Never mind; I'm just asking you if you did learn that, sir? A. Yes, sir.

Mr. Holman: I move the portion that said they can't be stricken, your Honor, complying with the rule.

The Court: That's all right.

Q. Now, directing your attention to the date shown here, will you tell me whether or not shortly after that you received that, or whether that date is correct—strike the question—will you tell me when you received that, looking at that date as to whether or not that is about the time?

A. 7/25/44.

Q. Is that about the time you received that?

Mr. Holman: Offer in evidence identification 85, your Honor, for all purposes.

Q. I asked if this is about the time you received it, the date there, is that right, or not?

A. A couple of days later, because that been by mail; it [1837] come in by mail.

Mr. Olson: We object to the introduction, your Honor, on the ground that it's a communication between Mr. Macri and his own foreman, Mr. Staples; nothing prepared by us. If he has the list which we gave them that would be perhaps of some effect, but the fact that Mr. Ashley sent in a

(Testimony of Sam Macri.)

list on that date has no binding effect on us; it's no indication that it was the first time it was ordered; it's no indication that that is the lumber which we did order, or a complete list of it, and is purely a self-serving document, particularly as to the typewritten portion of it, containing statements——

The Court: It seems to me that this statement "This lumber is not available at Sunnyside" is objectionable. I suppose it is a conclusion reached by Mr. Ashley, who is supposed to have sent the memo.

Mr. Holman: Yes, Mr. Ashley will be a witness and will further identify it, but the object I had in offering it now was that counsel on cross-examination interrogated about this in great detail, and I felt that made it competent upon the testimony of Mr. Macri.

The Court: Sustain the objection at the present time.

Redirect Examination

(Continued)

By Mr. Holman:

Q. I'll ask you whether or not with the listing as shown on [1838] identification 85, that was the lumber which was furnished for the stilling pool?

A. Yes.

Q. And will you tell me whether or not as between the date indicated on Macri's identification 85,

(Testimony of Sam Macri.)

and the time that the lumber was furnished, was the time you spoke of as spending to get that lumber?

A. Yes, it was the order.

Q. With reference to exhibit 84 and the calendar on that for 1944, and directing your attention specifically to the date of April 21 of the year 1944, and to the sub-contract on 1068, plaintiff's Exhibit 6, and the date thereof, April 21, 1944, which I'll hand you, Mr. Macri——

A. Yes.

Q. You have those; and directing your attention to your answers to counsel Olson on your cross-examination as to believing that that contract was signed on Sunday, can you tell me whether or not it was signed on Sunday, or whether it was signed on the date of the contract?

A. It was signed the day of the contract.

Mr. Olson: What was that?

(Whereupon, the reporter read the last previous answer.)

Q. Mr. Macri, when you from time to time went on to the job, 1062, schedule 1, will you tell me whether or not [1839] you devoted your time to the schedules 7, excavation common, 8, rock excavation, 9, back fill, 12, concrete structures, 13, placing re-enforcement bars, and 15, erecting timber in structures? Do you understand what I'm asking you?

A. I don't quite get that.

Mr. Holman: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

(Testimony of Sam Macri.)

Mr. Holman: I thought I had the word "exclusively" in there, Mr. Reporter. Exclusively upon those, or not?

A. Well, we just go around and look the job over.

Q. Mr. Macri, I'm asking you whether or not you spent all of your time on those items I've called for, or other items; what did you do?

A. No, I didn't spend all my time on that.

Q. Well, what did you do?

A. Well, we had pipe to lay, and several different items to take care of.

Q. But what did you do? I know you have other items, but what did you do?

A. Well, just go all over, look the job over.

Q. Well, on these items, or on all items, or what did you do?

A. On all items, naturally we looked them over.

Q. Now, will you tell me, please, whether or not when specification 1062, schedule 1, was taken over for operation by Mr. Schaefer, plaintiff's Exhibit 5, the sub-contract——

A. Yes.

Q. ——just a minute; will you tell me whether or not at that time there was any lumber or other lumber products which had been previously worked upon by the Macri forces ahead of that?

A. Yes, there was.

Q. Tell the Court what it was, will you?

A. Well, first we built a camp, put up an office, telephone and light, and we had considerable lumber

(Testimony of Sam Macri.)

material over there, started to build the forms; we had a lot of nails and a lot of miscellaneous.

Q. Well, were there any forms built, or not?

A. Yes, there were some forms built.

Q. By forms I mean the panels or the component parts of the forms?

A. Yes, there was quite a considerable panels.

Q. Approximately how many, would you say?

A. Oh, offhand I say probably about 25 or 30.

Q. And was Mr. Schaefer charged for that which you turned over, or not? A. No. [1841]

Mr. Olson: Now, if the Court please, I object to that. I thought counsel was leading up to something. I don't see any materiality whether or not they had 25 or 30 panels built when we took the job over, and whether they charged it to us or not.

Mr. Holman: There's to be an accounting made here, your Honor.

Mr. Olson: Not unless you've got some agreement of some kind with reference to it.

The Court: Well, Mr. Macri was to furnish the lumber, wasn't he?

Mr. Holman: Yes, your Honor, but this, as I understand his testimony, is manufactured forms.

The Court: Are you asserting a claim for those?

Mr. Holman: Not at all, your Honor.

The Court: What is the materiality, then?

Mr. Holman: Well, the materiality is on the matter of co-operation, your Honor.

The Court: Well, overruled.

(Testimony of Sam Macri.)

Redirect Examination

(Continued)

By Mr. Holman:

Q. And you said about nails; approximately do you recall how many nails or what kind of nails you had there?

A. Yes, there was eight or ten keg nails.

Q. And were those charged to Mr. Schaefer, or not?

A. No. [1842]

Q. Were they delivered to him, or not?

A. Well, they was in the shed over there, and I left them over there.

Q. Can you tell me whether they were delivered to Mr. Schaefer or not? In other words, did you get the use of them, or Mr. Schaefer?

A. Well, when we started we used some ourselves, and left them over there.

Q. I'm talking about after Mr. Schaefer took over, were the rest of those nails delivered to Mr. Schaefer to use, or did you take them away?

A. No, I didn't took them away.

Q. Well, were they made available for Mr. Schaefer, is what I want to know.

A. Yes.

Q. Now, Mr. Macri, calling your attention to what counsel read you from your deposition which had been taken at Seattle—I'm reading from page 41, line 3 to line 16, Mr. Olson—I'll ask you whether or not these were questions propounded to you, asked you, and answered: "Question: Were you on the job at a meeting with Mr. Schaefer when

(Testimony of Sam Macri.)

Mr. Staples was there? Answer: I will have to think about it. Question: I will ask you this way, Do you know who was there at the one time you do remember? Answer: I remember once when Mr. Schaefer and [1843] the bonding man was there. Question: But you do not remember who your foreman was? Answer: Mr. Staples was there, the foreman. Mr. Staples was the foreman then. Question: Was Mr. Staples there when you were talking with Mr. Schaefer? Answer: I think Staples come in afterwards. Question: Was Fred Waltie there? Answer: Who is Fred Waltie? Question: He was one of Mr. Schaefer's foreman. Was he there? Answer: That young man—yes. I think he was there.”

Now, did you testify to that at that time, the time of taking that deposition, that way?

A. Yes.

Q. Then turning, Mr. Olson, to page 59, line 21, of the Macri deposition, and continuing to line 3 of page 61, I'll ask you whether or not, Mr. Macri, at that time these questions were asked you and these answers given:

Mr. Olson: Is that on 59?

Mr. Holman: Line 21, to line 3 on page 61.

Mr. Olson: Well, that's where I read.

Mr. Holman: You did?

Mr. Olson: Yes, exactly.

Mr. Holman: Oh, then I have the wrong note,
Mr. Olson. Thank you.

(Testimony of Sam Macri.)

Q. (By Mr. Holman): Mr. Macri, in answering counsel about the laterals and the time you were on them with Mr. Klugg and [1844] some other gentleman, I think you said Mercelle, measuring, you stated, according to my notes here, you were on the first lateral and went from the structures one to one, that's the way my notes read, one to one; I'm not clear what you mean. Do you get what I'm talking about, Mr. Macri? You used these words, now listen, "one to one"; you used those words; now, what do you mean?

A. One to one?

Q. That's what you said into the record. Now, what do you mean by that? You said you looked at these structures one to one. What do you mean?

A. I meant to say one, two, three, and go on the line.

The Court: He meant one by one.

Q. That's what I thought. The record was not just clear on that. Is that what you mean, one by one, one right after the other?

A. That's what I mean.

Mr Holman: At this time, your Honor, in view of the cross-examination of counsel, and particularly the type of cross-examination of counsel, I offer in evidence Macri's identification 77, which had been previously refused as self-serving.

Mr. Olson: I make the same objection, if your Honor please.

The Court: I think it should be admitted now. It's [1845] been explained both on direct and cross.

(Testimony of Sam Macri.)

(Whereupon, Defendant Macri's Exhibit No. 77 for identification was admitted in evidence.)

Mr. Olson: Let the record show our objection on the further ground there aren't that many structures on the laterals he says he examined them on, and the record shows it.

The Court: Overruled.

Redirect Examination

(Continued)

By Mr. Holman:

Q. With reference to plaintiff's Exhibit 5, the sub-contract for performance on 1062, will you indicate off of the first page what portion you said was stricken out, that referred to steel only?

A. Yes, that's I imagine steel, and——

Q. Mr. Macri, I just can't have in the record what you imagine.

A. Yes, I said they mention here.

Q. Now, when you say "here" I want to get it for the purpose of the record, you're talking about the line that is X'd out, 5th line from the bottom?

A. Yes.

Q. You're not talking about the place in the middle of the page where there's X'ing out, or not?

A. No.

Q. And you were talking only with respect to that one page, [1846] were you? A. Yes.

Q. And were you talking from memory, or from examination of this page, Mr. Macri?

A. I examined it.

(Testimony of Sam Macri.)

Q. You examined the page, and you spoke from that, or from memory, which?

A. From that paper.

The Court: You'll have to speak up.

A. From that page there.

Q. I know you have a cold, but will you zoom your voice up?

Mr. Holman: Your Honor, at this time, in view of the cross-examination of counsel and particularly in view of the fact that there was produced the checks and vouchers he asked for, and have been returned to me, in the record, and also in view of the fact that at the time 76 was admitted your Honor limited the admission for the purpose of identification of the form only, I now offer them for all purposes.

The Court: What are those that are being offered?

Mr. Holman: Those are the ones, your Honor, that the Concrete Construction Company produced from their file.

Mr. Olson: I make the same objection, your Honor, that I made before to their admission.

The Court: What was the objection you made before? [1847]

Mr. Olson: Your Honor, I objected before on the ground that the original checks were the record of payment, not those vouchers; that they were only part of the document, had some matters on there which they had typed on them; they were not a complete record of payments, and that if they

(Testimony of Sam Macri.)

wished to introduce them, that the complete record of all the payments should be introduced, and not just a portion of the payment or a portion of the payments.

Mr. Holman: Yes, your Honor, and at that time, and I say again now, that I am going to have a complete accounting, including all the checks, but meanwhile counsel has interrogated Macri with respect to those particular vouchers.

The Court: He asked him, as I recall, whether they all had vouchers attached, and he said some did, or two didn't; what is the materiality?

Mr. Holman: Nothing, except perhaps an abundance of caution. I was under the opinion counsel asked something substantive on that.

The Court: I don't recall that.

Mr. Holman: Then I withdraw the offer, and allow it to stand as it had been previously admitted, so far as our case is concerned.

The Court: It is my understanding that there's no [1848] dispute in this suit as to the amount of payment made by Mr. Macri to the plaintiff in this contract, 1062; am I correct in that?

Mr. Holman: Within a matter of just a little difference in balances, your Honor.

The Court: I thought that in the pre-trial conference it was agreed that \$32,000.00, or something of that sort, I don't remember the exact amount, but I thought the amount paid was agreed upon at the conference?

Mr. Holman: That is correct.

(Testimony of Sam^y Macri.)

The Court: Then what is the materiality of showing payments by Mr. Macri? Is it the timely payments, or the amount of particular materials, or what is material, if the payment altogether is not disputed?

Mr. Holman: The only thing I have, your Honor, would be a proffer of all the vouchers. I'm not ready to do that now, and there has been a statement between the parties that I wish to prove in connection with the amount that's admitted, and the balance that's due. In other words, we find that Mr. Hendershott's account as to the amount received is identical, but there is some question of other charges.

The Court: All right.

(Whereupon, memo to Macri from [1849] King was marked Defendant Macri's Exhibit No. 86 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 87 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 88 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 89 for identification.)

Redirect Examination

(Continued)

By Mr. Holman:

Q. Handing you what have been marked Macri's identifications 86, 87, 88 and 89, will you tell me,

(Testimony of Sam Macri.)

please, how those came into your hands, and from what source they came to you? Where did you get them, Mr. Macri?

A. I got them from the superintendent on the job, whoever was in charge on the job.

Q. And who is represented by the initials S.R.K. on Macri's 86 for identification?

A. That's Mr. King.

Q. And who, sir, if you recall, sent the one marked Macri's 87 for identification? Do you know? If you know, all right; if you don't, all right, Mr. Macri. Do you know?

A. No, the mark isn't on, I guess.

Q. And who with respect to Macri's 88?

A. Mr. Ashley.

Q. All right, now with respect to Macri's 89, who, if you [1850] know?

A. No, there's no name here on that.

Q. Well, Mr. Macri, what I'm asking is, do you know who sent it to you, or don't you?

A. It's one of the superintendents on the job, but I don't know which one.

Mr. Holman: All right, sir. That's all, Mr. Macri.

The Court: Any recross?

Mr. Olson: Yes, there is. Are you going to offer these last identifications?

Mr. Holman: Which?

Mr. Olson: These last ones that the Clerk has.

Mr. Holman: Oh, no, I just had him identify them, is all.

(Testimony of Sam Macri.)

The Court: You may cross-examine him with reference to these identifications if you wish.

Recross-Examination

By Mr. Olson:

Q. Mr. Macri, on redirect examination counsel showed you this sub-contract on 1068, and two calendars, and asked you if you could then state whether or not the contract was signed on the date that it bears, and you said it was signed on the date that it was dated. How do you fix it as that date? How did you fix it as being signed on the date that it bears? [1851]

A. Well, we agreed that when we got together to sign, that's 1068 you're talking about?

Q. Yes.

A. Well, that 1068's been signed in my house.

Q. But how do you now say it was signed on the 21st of April, 1944?

A. Well, the contract was signed that day.

Q. What day was it?

A. On the 21st of April, 1944.

Q. Well, how do you fix it as being on that day?

A. Well, if I remember right, Mr. Schaefer say he come in over there in Seattle, and if it is prepared, we'll sign it.

Q. But how do you fix it as being the 21st of April, now?

A. Well, it was fixed because he told me he come in on that; that's why we put that date on the contract.

(Testimony of Sam Macri.)

Q. You said yesterday you thought it was signed on Saturday or Sunday. You thought it was Sunday.

A. My mind wasn't fresh; I'm not sure, though.

Q. Now, today you say it was signed on the 21st of April. I'm asking you how you fix it as that date?

A. Well, just as I tell you a minute ago, it was set up for that date and he come over and signed it.

Q. Now, isn't it a fact that it wasn't this contract but the other contract that was signed out at your home? [1852]

A. No, sir, I'm positive this is the one that was signed at home.

Q. And the 21st of April, 1944, was on a Friday, wasn't it? A. Yes.

Q. So now today you say it was on Friday it was signed? A. That's correct.

Q. It wasn't typed up at your home, was it?

A. No.

Q. So it had already been typed up before you took it home?

A. It was already typed up, and Mr. Schaefer say he come in through Seattle, and we make an appointment to meet him home and sign it.

Q. And you now remember, today, though you didn't remember yesterday, that was on Friday, the 21st of April, 1944?

A. I don't say I was positive yesterday.

Q. But today you're positive?

A. Well, my mind is freshed by looking at that.

(Testimony of Sam Macri.)

Q. Pardon?

A. Well, my mind is freshened by looking at that.

Q. You had that contract in your hand yesterday, didn't you?

A. I don't know if I looked at that or not.

Q. Matter of fact, Mr. Macri, you don't know anything about the date except what the contract says, do you?

A. I wouldn't say that; my mind is freshened now, when the contract was prepared, and we make an appointment to sign [1853] that contract.

Q. Your mind is fresher today that it was yesterday?

A. Customarily, usually, it is done that way, when we prepare a contract.

Mr. Holman: Your Honor, I just couldn't hear that.

The Court: Read that.

(Whereupon, the reporter read the last previous answer.)

Q. (By Mr. Olson): Now, counsel asked you on redict examination, Mr. Macri, why this lumber for the stilling pool and chute was not delivered until the first part of February, and you said that Mr. Darcy told you he didn't need it until the end of the job? A. Yes, he did.

Q. Did Mr. Darcy tell you that?

A. Yes, Mr. Darcy personal tell me once, for the stilling pool he don't need it, because that's the last operation he going to do.

(Testimony of Sam Macri.)

Q. So you got an order for it that you know of as early as July or June, I don't know when you said it was?

A. Well, the slip is over there.

Q. At the same time was it Mr. Darcy told you he didn't need it until the end of the job?

A. I insist myself to get a list on those lumber; in fact, I been insist times after times. [1854]

The Court: Just a moment. Strike that. Read the question. See if you can't answer these questions. Pay attention to them.

(Whereupon, the reporter read the last previous question.)

The Court: Now, do you understand the question? A. Yes.

Mr. Holman: Well, I don't know whether the witness answered yes to the question, or yes that he understood it.

The Court: He answered yes that he understood it, I assume.

Mr. Olson: I'll ask it again.

Q. (By Mr. Olson): Mr. Macri, Mr. Ashley relayed to you, as I understand it, an order for lumber for the stilling pool and chute, sometime in June or July; do you recall that?

A. Well, whenever the date is, over there on the slip, he sent the order in.

The Court: Wait a minute; what slip are we referring to, here. A. This order.

(Testimony of Sam Macri.)

The Court: Is that an order from Darcy?

A. Well, my superintendent sent that, the engineer there.

Q. But Mr. Darcy wasn't there then, was he?

A. I can't prove that he was there on that particular day. [1855]

Q. Well, when did Mr. Darcy tell you, Mr. Macri, that he didn't want the lumber for the stilling pool until the end of the job?

A. That was long afterwards what I placed that order, when he told me.

Q. When did he tell you that?

A. Well, that was when they was pouring concrete in the structures, then.

Q. Well, when was it, Mr. Macri, and where were you?

A. That must have been in the month of September sometime, if I recall it right.

Q. In September sometime?

A. Yes. I call his attention about this lumber, it was hard to get it, and I wasn't able to get it yet, this flooring, and he said "Well, I don't need it until the end of the job anyhow."

Q. Isn't it a fact Mr. Darcy had been trying to get that lumber for the stilling pool and chute ever since June, 1944, and ordered it as many as four times, and you didn't get it there until February, 1945?

A. I ain't got no recollection of that.

Q. Now, did I understand you to say that Mr. Staples—that Mr. Schaefer was responsible for Mr. Staples to leave this job?

(Testimony of Sam Macri.)

A. He sure tell me he wouldn't pour concrete till Staples [1856] was on the job.

The Court: Read that, I didn't understand that.

(Whereupon, the reporter read the last previous answer.)

Q. Now, and you said that was on June 14 that you and Mr. Schaefer had a telephone call and Mr. Schaefer said that? A. Yes.

Q. What is your number in Seattle? Telephone number?

A. Which one? We have several 'phones.

Q. Well, give me all of them.

A. I can't think of the number.

Mr. Holman: I think I can supply the number.

Q. Well, he ought——

A. Well, one was Main 3083, in Seattle.

Q. Main 3083? A. Yes.

Q. Now, what other numbers do you have.

A. I don't remember the other office number now.

Q. What?

A. I don't remember the other office 'phone number now.

Q. Do you know what your home number is?

A. Oh, yes, my home number is East 1466.

Q. East 1466? A. Yes.

Q. And you don't know what the other number is, of your [1857] other office?

Mr. Holman: Just a minute. That's the Stadium Homes, is that the one you're talking about?

A. Yes.

(Testimony of Sam Macri.)

Q. Is that the one that is Main 3083?

A. No.

Q. What is your Stadium Homes office?

A. That office has been closed for three years.

Q. Do you know what the number was there?

Mr. Holman: I have that, and his bridge job number; they're all in the book at that time.

Q. Is this Main 3083, was that your number in 1944? A. In Seattle?

Q. Seattle. A. Yes, still is.

Q. You don't know what your Stadium Homes number was, though, at that time?

Mr. Holman: I can supply the number from my desk.

Q. Do you remember the prefix of it?

A. I can't tell you that either, offhand. That's a long time ago. That office has been closed about three years now, I imagine.

Q. You don't know whether it was a Seneca number or a Prospect number? I wish you could get that.

Mr. Holman: I'll do my best to get it for you. Now, [1858] you want the Stadium Homes number?

Mr. Olson: I want to know whatever numbers he had over there.

Mr. Holman: Within what time? He has different telephones when he has different jobs.

Mr. Olson: I would like to have it through 1944.

Mr. Holman: I'll endeavor to do my best, considering it is Saturday, and I don't know whether

(Testimony of Sam Macri.)

we can get the service from the 'phone company, or Sunday, but I'll try it, though.

Mr. Olson: I would like to have Mr. Macri, if it could be, have Mr. Macri have a record of his long distance 'phone calls, particularly for the month of June, 1944.

Mr. Holman: Yes, that's all right.

The Court: Any further questions of this witness?

Mr. Hawkins: No questions, your Honor.

The Court: Mr. Holman?

Mr. Holman: No, your Honor — yes — just a minute.

Redirect Examination

By Mr. Holman:

Q. There's one place again the record there that I want to understand what you say, and what you mean. Did I understand you to say that Mr. Schaefer wouldn't pour till Staples was on the job? A. Yes, sir. [1859]

Q. What do you mean by "till"?

Mr. Olson: Your Honor, that speaks for itself. He may not have said what you wanted him to say, but I think he said that two or three times.

The Court: Well, I think under the circumstances he should be permitted to explain.

Q. (By Mr. Holman): Explain what you mean, Mr. Macri. Do you mean Staples wasn't on the job, and Schaefer wouldn't pour until he came on the job, is that what you mean?

(Testimony of Sam Macri.)

A. No, you see, he put up to me, he say Staples don't agree with him, and he don't care for him. In fact, I told him "Mr. Staples is the one that recommended you."

Q. Please, that isn't what I asked you. What do you mean by saying Schaefer wouldn't pour till Staples was on the job? What do you mean, that Staples had to come on the job?

A. He tell me I have to fire him before he pour concrete.

Mr. Holman: All right; that's all.

Recross-Examination

By Mr. Olson:

Q. Just a minute. Do you mean to say that Mr. Schaefer told you that you had to fire Mr. Staples?

A. Yes, that's just the words he used, and I told him he take too much power by doing that.

Q. And that's the same day that you called Schaefer, on June 14, 1944? [1860]

A. Well, that was when we had our conversation.

The Court: I didn't get that answer.

(Whereupon, the reporter read the last previous answer.)

Q. Now, isn't it a fact, Mr. Macri, that Mr. Staples simply didn't know how to figure out the fine grade elevations from these structure lay-out plans? A. In my opinion he did.

(Testimony of Sam Macri.)

Q. Well, you can't read them yourself, can you, Mr. Macri?

Mr. Holman: I object to that as argumentative, your Honor.

The Court: Well, I'll overrule the objection.

Q. Did you fire Mr. Staples, did you?

A. Not exactly fired; I bring an engineer over there so to settle everything up, and I thought that would be the best way out.

Q. Did you fire Mr. Staples, discharge him?

A. No, I wouldn't say exactly fire him; I just tell him about it, and he said it was alright with him anyhow, to get an engineer on the job, the circumstances the way they were.

Q. He said it was all right with him if you got an engineer on the job? A. Yes.

Q. And one that understood these plans, is that what he told [1861] you?

A. No, he told me he understood himself, everything.

The Court: I can't hear that.

Mr. Holman: Mr. Macri, nobody can hear you.

A. I say, Mr. Staples told me he understood how to do that operation himself, very well.

Q. But that you wouldn't give him any men to help him do it, is that what he told you?

Mr. Holman: I submit this is not proper cross or recross.

Mr. Olson: He's saying we made him get rid of his foremen, and that's why he had so many.

The Court: I'll overrule the objection.

(Testimony of Sam Macri.)

A. Every man on my job had a free hand to hire and fire and do whatever they please.

Mr. Olson: I move that be stricken as not responsive.

Mr. Holman: I join.

The Court: Well, read the answer.

(Whereupon, the court reporter read the last previous answer.)

The Court: I'll permit it to stand. I think you asked him if he didn't refuse to give Staples enough men.

Mr. Olson: I asked him if that wasn't what Mr. Staples said to him. [1862]

The Court: Well, the motion to strike will be denied.

Mr. Olson: That's all.

Mr. Holman: That's all, Mr. Macri.

(Whereupon, there being no further questions, the witness was excused.)

NIELS W. HJORTH

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Will you please state your name and your place of residence?

A. My name is Niels W. Hjorth. I live at 2653 Southwest 172nd, Seattle.

(Testimony of Niels W. Hjorth.)

Q. And what is your business, Mr. Hjorth?

A. Now?

Q. Yes, sir, what business are you in?

A. We're national distributors for Solo all purpose cream, right now.

Q. In 1944 I'll ask you whether or not you were in any manner employed by or associated with Mr. Macri, S. M. Macri, Sr., or Macri & Company?

A. I was employed.

Q. And what was your capacity at that time?

A. Estimator, purchase agent. [1863]

Q. You did or did not estimate on this job, Mr. Hjorth?

A. No, I did not estimate that job.

Q. I'll ask you whether or not with respect to plaintiff's Exhibits 5 and 6, which are the sub-contracts between M. C. Schaefer—pardon me—between the Concrete Construction Company and Macri and Company for specification 1062, schedule 1, and specifications 1068, of the Roza Project, now, referring to those, I'll ask you whether or not you were present or had anything to do with the preparation of these two? Will you look at them, please? I want to add to my question, Mr. Reporter, which are both executed copies.

A. Yes, I framed the contracts.

Q. Now, first, with reference—you said you did what?

A. Yes, I framed the contracts.

Q. What do you mean by framed?

A. Well, filled in the sub-contract forms.

Q. Now, first with reference to Exhibit 5, the contract covering 1062, will you please tell the

(Testimony of Niels W. Hjorth.)

Court to the best of your recollection—listen to me, please—tell the Court to the best of your recollection who was present and what was talked between those that were present, or the persons that was present, before you put any of the typing in there, and when you put it in, and what became of it, do you know, after it was completed? [1864]

A. Mr. Sam Macri asked me to——

Mr. Olson: Just a minute. If the Court please, I was afraid of that question, it asks so many things.

Q. All right, strike the question, Mr. Reporter. I was really trying to expedite the time. Do you remember who was present at the time that you typed that?

A. I didn't type it; I filled it in with pencil, and then had it typed.

Q. All right, sir; now, where was that done?

A. Stadium Homes project.

Q. Stadium Homes project means what?

A. Stadium Homes project is a housing job in Seattle.

Q. And how did you happen to be there?

A. I worked there.

Q. All right, sir. Now, you say you filled it in with pencil? A. That's right.

Q. Do you mean that particular document, or one of those forms, or what do you mean?

A. I filled in a similar form to this one.

Q. When you filled that in who was present; and I'm directing your attention specifically to Mr. M. C. Schaefer and Mr. Sam Macri, Sr.; were they present?

(Testimony of Niels W. Hjorth.)

Mr. Olson: Well, if the Court please, that certainly is leading and suggestive. Why doesn't he just ask [1865] him who was there?

The Court: I think that would be sufficient, to ask him who was there.

Q. Who was there?

A. Mr. Sam Macri was there and asked me to fill these in, to begin with.

Q. At the start? A. Yes.

Q. Did you see Mr. Schaefer at that time, or not? A. No.

Q. Then what did you do?

A. I filled them in, and had the girl in the office type it, and then Sam Macri came back and took it, and later came back with Mr. Schaefer.

Q. Now, when you say Mr. Schaefer, you mean Mr. M. C. Schaefer?

A. Yes, that was my recollection.

Q. All right, sir.

A. And there were some things that were to be corrected. I understood at first that Mr. Sam Macri wanted this contract——

Q. Pardon me just a minute. What were you going to say—what you understood? I don't want you to answer what you understood. I want you to answer what was done.

The Court: If they were both present. [1866]

Q. Yes, while they were both present, what was said?

A. Well, when Mr. Macri asked me to fill this in, I thought that the sub-contract was to include

(Testimony of Niels W. Hjorth.)

all labor and materials to be furnished by the subcontractor. This later was changed to exclude the lumber, and that was in turn crossed out.

Q. Now, was there any conversation by Mr. M. C. Schaefer and Mr. Macri in your presence in advance of those changes being made in that exhibit?

A. I don't recollect any of the conversation between the two.

Q. And were they present while that change was being made, or not?

A. Well, they were in the office at the time, when it was brought back for these changes.

Q. And you were present? A. Yes.

Q. And you delivered it to them?

A. I had the changes made and I delivered it to Mr. Macri.

Q. And do you know whether they were read or not, while you were there? A. Yes.

Q. Sir? A. Yes, they were read.

Q. Will you tell me whether or not each had a copy and read it, or not? [1867]

A. Yes, there were about three copies made, original and two carbon copies.

Q. Now, can you tell me whether or not it was signed as of the date it bears there in the front of it, Mr. Hjorth. Can you tell me whether or not the date that you had put in there was the date it was signed?

A. I don't know which one of these contracts was signed in the office there, or whether it was actually signed in the office at that time, I don't recollect.

(Testimony of Niels W. Hjorth.)

Q. Well, you don't know whether it was signed at that time or not?

A. To the best of my recollection one of these contracts was signed in our office at that time, but I wouldn't swear to it.

Q. Well, to avoid any confusion on your part, I'll hand you the other one, Exhibit 6, covering specification 1068, and will ask you if you can remember which was, if you can?

A. No, I don't remember.

Q. All right, sir. Now, then, after the contract shown as Exhibit 5 had been prepared by you—had been changed by you, was it then in the form that it now appears to be? A. Yes.

Q. Now, with reference to Exhibit 6, will you tell the Court, please, under what circumstances you prepared that, where [1868] it was prepared, and—

A. It was prepared by myself in pencil, and typed by the girl in the Stadium Homes Project, Seattle.

Q. Well, can you tell me whether or not Mr. M. C. Schaefer and Mr. Macri were present in advance of your putting the pencil information—I understand in the blank, you took one of those blanks and pencilled it in? A. That's right.

Q. Were Mr. M. C. Schaefer and Mr. Macri present when that was being done by you?

A. No, Mr. Schaefer was not there, as I remember it.

Q. All right, sir; then it was prepared by you that way, was it?

(Testimony of Niels W. Hjorth.)

A. Mr. Macri told me what he wanted, and I prepared it afterwards.

Q. Then isn't your answer similar to this one as it was to the other, that you took your pencil copy and had it typed? A. Yes, sir.

Q. And after it was typed were you present when it was before Mr. M. C. Schaefer and Mr. Macri; were they present at any time you saw them with that?

A. I don't recollect that they were both present.

Q. And with respect to the change shown on the second page of the typed body of the contract, the handwriting, [1869] quoting: "If bond is required, general contractor to pay the premium," and the initials "M. C. S."; were those put on in your presence, or not, do you recall? A. No.

Q. You mean you don't recall?

A. They weren't; I had only the typing there, what I recollect.

Mr. Holman: Your Honor, I find that this particular copy of 1062 has been marked in several places, for emphasis; I think that it should be eliminated, probably.

The Court: Yes, the Clerk should erase that. What is it, pencil underscoring?

Mr. Holman: On the side, and things like that.

Mr. Olson: I'd like to see it eliminated too; they're probably in the wrong places.

The Court: That should be erased, any underscoring or side marking.

(Testimony of Niels W. Hjorth.)

Mr. Olson: If I did it, they're in those places I didn't like.

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Hjorth, in what capacity were you serving with Mr. Macri at the time these agreements were drawn in 1944?

A. I was estimator and purchasing agent.

Q. And in connection with the—I'm not sure about this—in [1870] connection with the purchase of lumber for specification 1062, schedule 1, this Roza job, were you on that, or were you on the Stadium Homes only; what was your work?

A. My work was looking after Stadium Homes, together with some other jobs that we had at that time.

Q. But including or excluding the Roza?

A. I had nothing to do with that, except making out the contract.

Q. And I understand you did not make any estimates for the Roza bid? A. No.

Q. Would you state your experience in the construction field—and this is for the purpose of qualifying the witness as an expert, your Honor.

A. Well, for about twelve years I followed civil engineering and construction, and later on I followed general contracting. I was a contractor myself for fifteen years or more, and I came up to Seattle, and most of my contracting work of my

(Testimony of Niels W. Hjorth.)

own was done in California, then I came up to Seattle and went to work with the Alcan Highway, and later came back to Seattle and went to work with the Macri, Mullan, Stand and Tate, and later when they were separated I went to work with the Macri Company.

Q. The Alcan Highway you refer to is the Alaska-British Columbia highway? A. Yes.

Q. Now, in the course of your experience have you had occasion to become familiar with the manner for estimating the required amount of lumber for construction of concrete structures?

A. Yes.

Q. Has your experience on that been limited, or broad, over an extended period?

A. Quite an extended period.

Q. I'll ask you whether or not in your experience the quantity of lumber required for structures can be estimated by the cubic yardage of concrete placed?

A. No, there's so many different ways of placing concrete, if it is in a solid mass, why, it takes less form than it would if it had smaller walls and floor.

Q. What is the correct manner of determining the quantity of lumber required for placement of concrete in concrete structures?

A. The surface area.

Q. Now, will you explain that, please, to the Court, what you mean by the surface area?

A. Well, there are——

(Testimony of Niels W. Hjorth.)

Q. Just a minute, Mr. Hjorth. Would you please step down and come over here to this model? With reference to what has been admitted in evidence as plaintiff's Exhibit 26, [1872] representing a poured form, will you indicate to the Court what surface areas you have in mind in your answer to me?

A. The sides on the exterior and also on the sides on the interior, and the bottom of any floor above the ground.

The Court: Recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Hjorth, have you had opportunity since you came from Seattle to consult the records and the documents and the other information to determine the quantity of lumber required for performance of the concrete excavation quantities on specification 1062, schedule 1? A. No.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. Mr. Hjorth, you say that in determining the quantity of lumber required for concrete forms, for concrete structures, it is based on the surface area; surface contact area, I take it you mean?

A. Yes.

(Testimony of Niels W. Hjorth.)

Q. Now, is it possible to then transmit that into the amount required per cubic yard of concrete?

A. Well, the way to determine your form work is to figure all of your surface area, and you have to figure your structure, your curlers, your placing, and all the lumber that goes into the form work.

Q. And you can determine, then, how much is required per cubic yard of concrete, can't you?

A. Yes.

Q. And handing you plaintiff's Exhibit 3, and calling your attention to item 12, concrete in structures, that calls for a bid of lumber per cubic yard of concrete, does it not? A. Yes.

Q. So in order to bid on that item one would have to figure the lumber per cubic yard of concrete? A. Yes.

Q. Now, referring to plaintiff's Exhibit 5, I believe you said that you prepared that?

A. Yes, I did.

Q. Now, as I understand it, Mr. Hjorth—

A. Pronunciation is the same as Yort.

Q. Thank you—that the X'ing out of part of the typewritten matter was done in order to show that Mr. Macri would furnish the form lumber instead of Mr. Schaefer? A. That's right.

Q. And that was the only reason that the change was made? [1874]

A. Well, I think I had all materials in there was to be furnished, and that was a mistake on my part, I guess, because I think if I recollect, the government was to furnish the steel.

(Testimony of Niels W. Hjorth.)

Q. Well, I'm asking you, Mr. Hjorth, though, the reason you made that change was to place the responsibility upon Macri and Company to furnish the form lumber, and not Mr. Schaefer?

A. That's right.

Q. And that's the only reason you made that change?

A. Yes.

Q. And your recollection was that that was not made after Mr. Schaefer came back?

A. Well, on one of these contracts Mr. Schaefer was over there. Which one, I don't recollect.

Q. Then you're not sure, Mr. Schaefer was there when that change was made, are you, Mr. Hjorth?

A. Mr. Schaefer was there at the time one of these contracts—were both of these contracts for the Concrete Construction Company?

Q. Yes, they are, Mr. Hjorth. Handing you also plaintiff's Exhibit 6, you're not sure just which one of those contracts it was that Mr. Schaefer was present when it was signed?

A. If you will excuse me a minute I'll look at this. This [1875] is the one here.

Q. You're referring to Exhibit 5? You saw Mr. Schaefer sign Exhibit 5?

A. No, I don't remember about the signing.

Q. Well, that's what I wanted to get at. You weren't present, as a matter of fact, when Mr. Schaefer signed either one of these contracts, were you?

A. I don't remember whether they were signed in my presence or not, because I was busy with a

(Testimony of Niels W. Hjorth.)

lot of other things, and I helped fill them out, and when the changes were made, I didn't pay any more attention to it.

Q. Mr. Schaefer wasn't present, was he, Mr. Hjorth, when even this change was made at the bottom of page numbered 1 of the contract?

A. He was over in the office at the time when we made those changes, yes.

Q. Now, Mr. Hjorth, asking you to look at that part that's X'd out closely, and I'll ask you whether or not the form lumber was not already excluded before you X'd that out? A. No.

Q. Can you read it through there?

A. Wait until I get my glasses on, I probably can. Well, the way it reads to me, if I am correct "to furnish all labor and materials except form lumber and re-enforcing [1876] steel."

Q. Yes, so the form lumber and re-enforcing steel were already excluded, weren't they?

A. It appears they were.

Q. Yes, so that wasn't X'd out, then, in order to eliminate the lumber, was it?

A. No, evidently not.

Q. So now, isn't it a fact, Mr. Hjorth, that that change was made in there before Mr. Schaefer ever got there?

A. Well, there were some changes and additions made in this contract the time he was over there.

Q. But you don't know what they are or why they were made, or do you?

(Testimony of Niels W. Hjorth.)

A. It was on account of materials; Mr. Schaefer was to furnish some materials and Mr. Macri was to furnish some materials.

Q. You just don't now recall what it was?

A. It was three years ago, and it's kind of hard to remember that.

Q. I appreciate that, and if you don't remember, if you'll tell me, so I'll not ask you about it; if you do remember I would like to know.

A. All I remember now is that there were changes made at that time.

Q. But just what they were, or what they were for, that you [1877] do not recall?

A. My recollection was that it was on account of lumber that was to be excluded from the contract.

Q. That's your recollection? A. Yes.

Q. You are an attorney, Mr. Hjorth?

A. No.

Q. You've never been admitted to the bar?

A. No.

Q. Are you a graduate engineer? A. No.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. I'm interested, Mr. Hjorth, in your answer to counsel's question with reference to Exhibit 3, and calling your attention to the schedule number 1, item 12, concrete, 1515 cubic yards; now, can you from that item alone, without other informa-

(Testimony of Niels W. Hjorth.)

tion, determine the quantity of lumber as an estimate that would be required for the job?

A. No.

Q. What else would you have to consult?

A. I would have to have the plans showing the sizes of the structures.

Q. And in advance of that could you determine the lumber? A. I could from the plans.

Q. Yes, but without the plans could you?

A. No, it is impossible.

Q. So is it or is it not a fact that if somebody said to you "Item 12 in a contract calls for 1515 cubic yards of concrete placed; tell me how much lumber you need to place that concrete," could you answer, or not?

A. You couldn't tell how much lumber was necessary for it without the plans.

Q. Explain to the Court why, will you?

Mr. Olson: Your Honor, there is no controversy about that at all.

Mr. Holman: I understood counsel to ask him if off of that alone he could determine——

Mr. Olson: I understood you to say you couldn't figure lumber by the cubic yard.

Mr. Holman: I still say that.

Q. (By Mr. Holman): Can you, Mr. Hjorth, figure the board lumber required by knowing the quantity of concrete alone? A. No.

Mr. Holman: That's all.

(Testimony of Niels W. Hjorth.)

Recross-Examination

By Mr. Olson:

Q. Then as I understand it, Mr. Hjorth, unless one also had the plans and specifications, it would be utterly impossible to submit a bid on item 12 of these specifications, unless they also had with it detailed plans showing [1879] the size and elevations of the structures of the type that you have seen in the model exhibit here in the courtroom?

A. Unless you have some other plans in here showing the sizes and the measurements for those structures, you couldn't do it.

Mr. Olson: Thank you; that's all.

Redirect Examination

By Mr. Holman:

Q. In other words, Mr. Hjorth, would the matter of the amount of lumber be one of speculation until you had plans? A. Yes.

Mr. Holman: Thank you; that's all.

(Whereupon, there being no further questions, the witness was excused.) [1880]

Mr. Holman: I would like to call Mr. M. C. Schaefer out of turn, under the rule, as an adverse witness, your Honor.

The Court: All right.

Mr. Olson: What do you mean, out of turn?

Mr. Holman: Strike out of turn; as an adverse witness under the rule.

M. C. SCHAEFER

the plaintiff, called by the defendants Macri as an adverse witness, resumed the stand and testified further as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Schaefer, are you the one person who can tell me the quantities of concrete that were placed during the operations of the Concrete Construction Company on specification 1062, schedule 1? [1881]

A. I can by referring to the record, yes.

Q. Is there anyone more able to do so than yourself, more expeditiously to do so?

A. I don't believe so.

Q. All right, sir. I'll ask you, please, if you will tell me whether or not during the month of May, 1945, you placed 94.76 cubic yards of concrete?

A. During the month of May?

Q. Pardon me; April, 1945.

A. Month of April?

Q. Yes, sir.

A. How many yards?

Q. 94.76. Specifically, I am directing your attention, Mr. Schaefer, to Macri's identification 17, a letter of May 21, 1945, to the Concrete Engineer from the Construction Engineer, and to the second paragraph thereof, referring to specification 1062, schedule 1, and the figure 94.76 cubic yards.

A. Now, then, that—their figure about goes from the 25th of one month to the 25th of the other. I

(Testimony of M. C. Schaefer.)

could refer back to my record to see just what yardage was poured, or number of batches, rather.

Q. And would your answer be so with respect to each of the cubic yardages shown in similar reports for each of the months covering the periods that you were placing concrete [1882] in the structures?

A. Well, our batching—the engineer's estimate would vary a bit with our record, because they had the actual size, they computed the actual size of the batches, where we counted by the batch, but they should be very close.

Q. Then is it or is it not a fact that the current monthly reports in this document, these documents, which I have indicated to you for the respective months that you were placing concrete would be a reasonable and fair gauge of the performance of placing concrete by your organization?

Mr. Olson: Now, that's objected to, unless the witness is given an opportunity to examine each of the documents that counsel is referring to.

Q. Well, I'll give him that opportunity, but I understood from the witness' last answer, I maybe misunderstood you, Mr. Schaefer; I thought you said that they were reasonably comparable, correct?

A. That is, the engineer's estimate was reasonably comparable to our daily reports for each month's estimate of quantity, with an exception here that there were poured, I believe, about 178 yards more of concrete than the engineer's estimate.

(Testimony of M. C. Schaefer.)

Q. All right, Mr. Schaefer; do you have some tabulation that you can consult there as against these reports that I'm interrogating you upon, and tell me whether or not the [1883] reports are reasonably representative of the concrete that was poured—that was placed?

Mr. Olson: Now, if your Honor please, it is immaterial, it seems to me, whether or not these records are accurate or not; if counsel wants to ask this witness what we did pour, and have him testify as to that, that's something else; but to have him establish the correctness of some engineer's reports, that's not in issue in this case.

Mr. Holman: Very well, I'll proceed that way. Will you please get the records and have them there on the stand? I want to ask you about some monthly performances here with respect to placing concrete.

The Court: Are those records in such condition that you can sort them out soon, Mr. Schaefer?

Witness: I believe so.

The Court: I don't propose to wait here indefinitely for Mr. Schaefer to pick out some records, unless you have given him notice to prepare them in advance.

Mr. Holman: No, I didn't; I didn't contemplate that I would be required to do that. I'll withdraw Mr. Schaefer from the stand now.

The Court: Well, if you will tell him what to get, maybe he can have them for you Monday.

Mr. Holman: I can't tell him what to get.

(Testimony of M. C. Schaefer.)

The Court: Well, you want his monthly reports of concrete poured, don't you?

Mr. Holman: That's right, your Honor. Mr. Schaefer may be withdrawn.

Mr. Olson: Will you have that ready, Mr. Schaefer? What I understand he wants is our records showing the cubic yardage of concrete poured each month.

The Court: Yes, that's right. Are those records there so he can get them soon?

Mr. Holman: I want the amount of concrete placed according to the specifications.

The Court: Each month?

Mr. Holman: Each month, yes.

Mr. Olson: He says he has it now, if you wish to proceed.

Mr. Holman: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give me the amount of concrete placed in structures on specification 1062, according to the records of the Concrete Construction Company, for the month of April, 1944?

A. I haven't got April here on that. I've got up to and including March. I fail to have April.

Mr. Olson: He's saying April, 1944. [1885]

A. Of 1945?

Mr. Olson: I think the testimony is we didn't pour any until the 29th of July.

(Testimony of M. C. Schaefer.)

Q. Yes; I'm asking about April, 1944. Did you pour any—did you place any concrete in structures? A. Of course not.

Q. All right; May, 1944? A. No.

Q. June, 1944? A. No.

Q. July, 1944?

A. July of 1944 we placed four batches.

Q. Four batches of concrete exhausts how many sacks of cement?

A. I believe it was four sacks to the yard of concrete—six sacks per yard of concrete, that would be 24 sacks.

Q. Is it or is it not a fact that in March or in April you received from the government 665 sacks of cement? A. In April?

Q. April, 1944, and none of that was used until July, 1944, correct?

A. That's right; I believe that's correct.

Q. All right. Give me, please, the quantity of concrete that you placed in July in the structures, July, 1944.

A. Four batches. [1886]

Q. I thought you were going to give me yardage? Can you do it?

A. I'll not be able to give you yardage, because that's computed by the engineers, as the batches are larger than one cubic yard of concrete.

Q. Are you able from your answer as to batches to give me the quantity of concrete placed in the forms?

A. There's four plus yards for the month of July.

(Testimony of M. C. Schaefer.)

Q. The month of July is how many batches?

A. Four.

Q. And that's how many sacks?

A. That would be about 24 sacks.

Q. All right, sir; in the month of August how many batches?

A. Month of August there's $162\frac{3}{4}$ batches.

Q. And how many sacks?

A. Well, six times that. I haven't got a calculator here, unless you wish to wait.

Q. Times six will equal it?

A. I believe that's right, yes.

Q. Six sacks to a batch, is that it?

A. That's right.

Q. All right, sir. The month of September?

A. $131\frac{1}{2}$.

Q. How many yards, cubic yards of concrete placed, that 4 batches and $162\frac{3}{4}$ batches would yield? [1887]

A. Will you repeat that again, please?

Q. Yes. How many cubic yards of concrete placed in the structures do you say that 4 batches plus $162\frac{3}{4}$ batches would yield, in concrete placed in the structures?

A. 4 batches and $162\frac{3}{4}$?

Q. Yes.

A. In other words, $166\frac{3}{4}$?

Q. Here, I'll give you a pad to figure on.

A. I have a pad. $166\frac{3}{4}$ batches——

Q. Yes, sir; equals how many yards?

(Testimony of M. C. Schaefer.)

A. I believe at that time they were computing on the basis there of about 1.11 yards of concrete to the batch.

Q. Well, do you have to compute that, or can you tell me?

A. I don't have the Bureau's figures on that.

Q. Just your estimate; I'm just trying to get your estimate of quantity of concrete placed in the structures for those two batches.

A. Well, then, I'll qualify what I have to say in that respect a little further. I did ask, I believe it was Harold Nelson, what the average yield was, and if I remember right——

Q. I'm just not interest in conversation; I want your——

A. Well, I don't know.

Q. All right, sir; then you can't tell me from your record of batches what amount of concrete was placed in the [1888] structures, can you?

A. I'd say at that time there was about another 185 yards.

Q. 185 cubic yards, for the months of July and August, correct?

A. I believe that's about it. That's basing it on 1.11 yards per batch.

Q. All right, sir. Then would you say, Mr. Schaefer, that the report contained from the Concrete Construction engineer to the Concrete Engineer in a communication of September 19, 1944, that there had been placed 180.5 cubic yards of concrete in 87 structures was a fair statement?

A. Yes.

(Testimony of M. C. Schaefer.)

Mr. Holman: I offer in evidence, your Honor, or I'd like to have marked for identification the same as was previously offered, your Honor, the heading and then the asterisks and then the particular paragraph with respect to specification 1062.

Witness: Pardon me, I want to clarify a little bit right here on that. The Bureau computes that from their plans at their job office, I mean at their office, and that doesn't take into account the over-run, so there may be the difference between the engineer's data there and the actual quantity, which they check, as one of their engineers testified here, that the amount that went [1889] through the mixer——

Q. Yes; now don't you know from your experience in connection with this job, and as a matter of fact, the reports to which I am directing your attention is a matter of batching report, or is this concrete placed in the forms?

A. That there is the engineer's daily report.

Q. Yes, sir. This says, as I remember the figure, 180 some odd cubic yards of concrete placed in so many structures. Now, I ask you if that is a fair comparable amount with your batching record which you are giving me for the period indicated?

A. Yes.

Q. All right.

A. Their data out there in the field wouldn't necessarily be to the exact yard, when they send in their dope to their office.

Q. Similarly, Mr. Schaefer, if it can be done, at your convenience during the interim until the

(Testimony of M. C. Schaefer.)

next session of court will you determine and tabulate the batches for the months of October, November, December, 1944, and January, February, and March, 1945?

A. I have the number of batches right here.

Q. You have, sir? All right. Then what do you have for September? I think you gave me 131½, did you not? A. That's correct. [1890]

Q. And I'll ask you whether or not the statement in a communication from the Construction Engineer to the Concrete Engineer on October 23, 1944, in specification 1062—pardon me, schedule 1, of placing 142.75 cubic yards of concrete in 65 structures is a fair——

Mr. Olson: Just a minute. Your Honor, I object to that as being wholly immaterial, whether the statement made in some communication from somebody in the Bureau of Reclamation is a fair statement or is not a fair statement. It's wholly immaterial as far as this lawsuit is concerned.

Mr. Holman: I'm asking if it is a fair representation of the quantities comparable with your batches.

Mr. Olson: That also is immaterial, whether or not our records fairly compare with a letter that somebody wrote to the Bureau of Reclamation.

The Court: I don't get your purpose. Are you trying to elicit the testimony of this witness as to what his records show, or are you trying to get him to identify these documents so that you may admit them in evidence?

(Testimony of M. C. Schaefer.)

Mr. Holman: I'm trying to get a statement from the witness of a comparable difference, or an amount of the difference. I'm using it as a guide.

The Court: Is it your position if he says [1891] they are approximately the same that would make it admissible?

Mr. Holman: No; if he says they are practically comparable I would have his testimony.

The Court: Why don't you make a statement of whether they compare?

Mr. Holman: I was trying to avoid his testimony. That's why I asked for it over the recess; it would save a lot of time.

Mr. Olson: If he wants to ask this witness what concrete he poured each month, the witness has the figures, and he can give them. It is wholly immaterial and irrelevant whether or not our figures compare or are the same or similar to the figures written from one officer of the Bureau of Reclamation to another officer of the Bureau of Reclamation.

Mr. Holman: My point is this, and this only, may it please the Court: Mr. Schaefer has answered me he can't give it to me except by batches, and it will take a computation on a basis of approximately 1.11 to determine.

Witness: That has varied, and you didn't allow me to finish my answer a little while ago wherein Mr. Nelson told me that the average was less than that.

(Testimony of M. C. Schaefer.)

The Court: That will be stricken. Just answer questions that are asked you. [1892]

Direct Examination
(Continued)

By Mr. Holman:

Q. If you can give me the yardage that was placed in structures in the months of June, July, August, September, October, November, December, 1944, and January, February and March of 1945, please give it to me.

The Court: If Mr. Schaefer can compute only batches, and can't change them into yardage, how can you tell whether those figures of yours are correct, in your documents?

Mr. Holman: I'm only asking them if they are reasonably representative of his answer as to batches.

The Court: How can he tell, if he doesn't know how many batches in how many yards?

Mr. Holman: He does, your Honor. He says 1.11, from certain explanations.

The Court: I judge from what's been stricken that that's what somebody else told him.

Mr. Holman: I don't care who told him. He can answer me if he can give me yards.

Witness: I'll give you batches. I won't take the yards.

Q. And you would not be able to give me the cubic yards of concrete placed in any of these months that I've indicated?

(Testimony of M. C. Schaefer.)

A. I'll give you the batches. You asked, what was the last [1893] previous question there, on around 148 yards?

Q. Well, Mr. Schaefer, would you permit me to ask the questions? I asked you if you can, you say you can give me the batches. Now, instead of the batches, can you give me the cubic yards according to your records, placed in the structures on specification 1062, schedule 1, for the months I've called?

A. I can give you the number of batches, but as to the yardage, I can't give you that because of the variation.

Q. That's what I thought you told me before. Will you please call the batches for the respective months that I've indicated, Mr. Schaefer?

A. O.K.

Q. You've given me for July.

The Court: He's given them up including September.

Q. Now, October, number of batches.

A. Well, then, in October, they're between the 26th or 25th of one month and the 25th of the next, there were 148 batches.

Q. 148 batches in October?

A. That's correct.

Q. What in November?

A. In November there were 222 batches.

Q. All right, sir. What in December? [1894]

A. December, 66 batches.

Q. Yes, sir; and what in January?

A. 144 batches.

(Testimony of M. C. Schaefer.)

Q. Yes, sir; and what in February?

A. 188 batches.

Q. And what in March?

A. March was 40 batches.

Q. Yes, sir. Now, was it those batches which you have given me upon which you base your estimate of 150 feet, board measure, to the cubic yard of concrete, as the true test of lumber required?

A. No, that's based on surface feet of form in a representative number of structures, and dividing through that by the number of yards of concrete contained in those structures.

Q. Now, isn't it a fact, Mr. Schaefer, that the way you arrived at the 150 board feet per cubic yard of concrete placed in structures was to take the performed quantity which the government has fixed and divide that by the amount of lumber that you know you had, and your result was your 150?

A. No.

Mr. Holman: You may inquire.

Mr. Olson: No questions.

The Court: Any further questions? [1895]

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, do you have any difficulty understanding Mr. Macri? A. Do I?

Q. Yes.

A. I think I can understand him pretty well.

Q. You understand him pretty well?

A. Uh huh.

Mr. Hawkins: That's all.

(Testimony of M. C. Schaefer.)

The Court: Any other questions?

Mr. Holman: No, your Honor. That's all Mr. Schaefer.

Mr. Hawkins: By the way, I meant his speech; is that what you meant? A. Yes.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: Your Honor, I would like to offer in evidence as the progress report of the government, which according to the adverse party, Mr. Schaefer, is not disputed as to a representative showing, what has been marked identification 17-c, being the letter of September 19, 1944, from the Construction Engineer to the Concrete Engineer, and containing therein paragraph 6 the report of the amount of cubic yards of concrete placed in the number of structures indicated.

Mr. Olson: Your Honor, I object to its admissibility on all the grounds stated previously, and the further ground that the witness hasn't even seen the communication, and the mere fact that somebody writes a letter to somebody else, and we don't dispute it, certainly doesn't make it admissible in evidence.

The Court: Those documents referred to contain other matter than just the bare amount of concrete poured, Mr. Holman?

Mr. Holman: Yes, there is subdivisions, and it covers all the specifications on the job, and then they lump into specification 1062, schedule 1, all

that they have that month for a report. It is only a report; that's all it can be.

The Court: It contains statements such as, as I remember "Excavations made ahead of structures"?

Mr. Holman: Yes.

The Court: And it isn't limited to the quantity of concrete?

Mr. Holman: No, sir.

The Court: And the objection Mr. Olson made that [1897] I thought was well taken is that he has no opportunity to cross-examine the people who wrote those statements; if I admit them in evidence he can't question them at all.

Mr. Holman: No, but on this 17-c, the only portion I would want in view of the examination of Mr. Schaefer would be this: "Concrete Construction Company, sub-contractors on structures, placed 180.5 cubic yards of concrete in 87 structures"—and finish the sentence, "which is regarded as good progress for the first month's work." The rest of it is on other matters.

Mr. Olson: Your Honor, please, this particular letter here is apparently written by some fellow by the name of Tyler, and it is his summation of what somebody else reported to him; it is even that far away. Now, he's had Mr. Schaefer on the stand and testified to how many batches he poured. How that makes a letter based on what somebody else told them admissible into evidence, I can't see it. If that's admitted I suppose counsel's got 15 or 20 more.

Mr. Holman: I have one for each month, your Honor, on the question of cubic yards of concrete placed in structures.

Mr. Olson: And they're not competent.

The Court: I don't believe the testimony of Mr. Schaefer would make them admissible. [1898]

Mr. Holman: Then I presume it would do me no good to make an application to take the deposition of Mr. Tyler, who I understand is in Kansas?

The Court: What would you think?

Mr. Holman: I think it would not, your Honor. Shall I start on another witness, your Honor?

The Court: How long do you think this case is going to take, next week, or the week after?

Mr. Holman: I'm so heartened, your Honor, by the brevity of opposing counsel's cross-examination that I'm hopeful it will be completed this next week.

The Court: About how many more witnesses do you have?

Mr. Holman: About—I hadn't counted them—I think six, your Honor; maybe seven.

The Court: Well, I have a grand jury session in Spokane beginning the 25th.

Mr. Holman: Of March?

The Court: Yes, and it is necessary that I get back there, and in my judgment this case has taken much more time than it should have done now, and unless it is hurried along, we'll have to start having longer sessions and night sessions next week. We'll have to finish next week. The Court will adjourn until Monday morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Monday, March 17, 1947, at 10 o'clock a.m.)

